TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 268.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, HARRIET WATKINS, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE H. TORNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED APRIL 6, 1900.

(18,384.)

22995

(18,884.)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 8, 1903.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western division of the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardie H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Amdre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse by thier mother and next friend all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, all residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles D. Sanford residents of the State of Mississippi; Mary A. Bres, resident of the State of Illinois; Ellen M. Parker resident of the State of California; George B. Muse and Mary L. Muse residents of the State of Minnesota; Malvina R. Muse Bowman, resident of the State of Wisconsin; Bessie Muse resident of the State of Iowa; James Fort Muse resident of the State of Oregon; Mary E. Behen resident of the State of Missouri; Alice F. South resident of Mexico and Victoria A. Horton Bart-olomew now Mrs. J. D. A. Harris resident of the State of Washington; Frederick Horton and Joseph E. J. Muse residence unknown, plaintiffs, and George H. Torney, defendant, a manifest error hath happened, to the great damage of the said plaintiffs as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly; you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and three.

W. P. FEILD,
Clerk of the Circuit Court of the United States, West. Div., East. Dist. Ark.

Allowed by—
JACOB TRIEBER,
Judge, East. Dist. Arkansas.

Service — this writ acknowledged this 14th March 1903.
WM. G. WHIPPLE,
Att'y for Def't.

Endorsed: Filed M'ch 14, 1903. W. P. Feild, clerk.

1 Be it remembered that on the 14th day of August, 1902 came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas Hippolite Filhiol, Francis J. Watts, Harriot L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Waters, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andrae A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse by their mother and next friend, all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Margaret A. Horton Campbell, Blanch- F. Power, Robert W. Fenner all residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford residents of the State of Mississippi; Mary A. Bres, resident of the State of Illinois; Ellen M. Parker, resident of the State of California; George B. Muse and Mary L. Muse residents of the State of Minnesota; Malvina R. Muse Bowman resident of the State of Wisconsin; Bessie Muse resident of the State of Iowa; James Fort Muse resident of the State of Oregon; Mary E. Behen resident of the State of Missouri; Alice F. South resident of Mexico and Victoria A. Horton Bartholomew, now Mrs. J. D. A. Harris of the State of Washington; Frederick Horton and Joseph E. J. Muse residence unknown by W. S. and F. L. McCain Esqs., their attorneys and filed therein their bill of complaint at law with exhibits against George H. Torney which complaint is in words and figures following to wit:

2 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, HARRIET L. WATKINS, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by Their Mother and Next Friend, All Residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, All Residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford, Residents of the State of Mississippi; Mary A. Bres, Resident of the State of Illinois; Ellen M. Parker, Resident of the State of California; George B. Muse and Mary L. Muse, Residents of the State of Minnesota; Malvina R. Muse Bowman, Resident of the State of Wisconsin; Bessie Muse, Resident of the State of Iowa; James Fort Muse, Resident of the State of Oregon; Mary E. Behen, Resident of the State of Missouri; Alice F. South, Resident of Mexico, and Victoria A. Horton Bartholomew, Now Mrs. J. D. A. Harris, Resident of the State of Washington; Frederick Horton and Joseph E. J. Muse, Residence Unknown,

vs.

GEORGE H. TORNEY.

The plaintiffs state that in the year A. D. 1821 Don Juan Filhiol, who was then a citizen and resident of the State of Louisiana died intestate, and the plaintiffs herein, citizens of the United States, are his descendants, and his only descendants and heirs, and each and every one of said Filhiol's descendants who are dead died intestate—at least so far as the lands hereinafter described are concerned; that said Filhiol was born in the year 1740, and settled in Louisiana in the year 1779, and was appointed in the year 1783 by the King of Spain a captain in the latter's army and commandant of the militia, and assigned to duty at the post of Ouachita, Louisiana under Don Estevan Miro, the governor general of the province of Louisiana; that during the years from 1783 to 1789, inclusive, Don Estevan Miro was the governor general of the province of Louisiana under and by authority of the King of Spain and was by the King of Spain duly authorized and empowered to represent and act in behalf
3 of said king as his regent and governor and to do such acts and make such grants of land in said province as the king himself might do and make, and during the same period last aforesaid Don Carlos Trudeau was the royal surveyor general of the said province, thereto duly appointed and by the king vested with all the powers appertaining to such office by the law and customs of the Kingdom of Spain and that both said Miro as such governor and said Trudeau as such surveyor general, were duly authorized and

empowered to do and perform all the acts hereinafter stated to have been done and performed by them respectively and therein represented to the said king, and their said acts were legal and binding upon the said king as if done and performed by him according to the laws and customs of said kingdom. That on December 12, 1787, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land, whereon the governor ordered the land applied for to be surveyed, and thereafter before the 22nd day of February, 1788, Don Carlos Trudeau, the then surveyor general of the province of Louisiana, made a survey of the said land in accordance with the laws then existing and made a report thereof, with figurative plan and procès verbal, or certificate of description of the land to be granted, in due form, in and by which the said land was described as follows to wit: A tract of land with a front of eighty-four arpens, and a depth of forty-two arpens on each side of the stream called "La Source of d'Eau Chaude," about two leagues distance from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by land belonging to the crown. That upon such report of said surveyor general and such figurative plan and process verbal, or certificate of description so made and returned to him the said Governor Don Estevan Miro, in his capacity as repre-
4 sentative of the King of Spain, did then make and deliver to the said Don Juan Filhiol a royal grant for that certain league of land, so surveyed, represented on said figurative plan, and described in said process verbal, or certificate, by said surveyor general, and the said royal grant is now in the possession of these plaintiffs, ready to be produced as the court may direct, and the same is hereinafter set forth in this complaint.

That said grant of land was made to their said ancestor, Don Juan Filhiol, while he was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity as commandant of that then important post, and other valuable and distinguished services by him rendered to the King of Spain; that the said Don Estevan Miro, in his capacity as governor general of Louisiana was by the Spanish colonial laws vested with power to make said grant of land and convey by said grant the absolute fee simple to the land thus granted; that said land so granted by the said Don Estevan Miro, as governor, on the 22nd day of February, 1788, to the said Don Juan Filhiol, consisted of a certain one-square league of land with the Hot Springs, at the city of Hot Springs, in Garland county and State of Arkansas aforesaid as the center of said league, the description, metes and bounds of which league of land are more fully and accurately measured and described in said survey, figurative plan, and process verbal, of the said Don Carlos Trudeau, hereinbefore mentioned; that such description as so surveyed, represented on said figurative plan and set forth in said process verbal, and by said grant conveyed to said Don Juan Filhiol is definite and certain and applicable to the land described so as to

distinguish and identify the same; said land embraced the land in controversy hereinafter described; that said grant is in the Spanish language and is in the words and figures following to-wit:—

De los Reales Exercitos Gobernador, e Intendente de las Pro-
5 vincias de las Lusiana y Florida Occidental e Inspector de sus Tropas &ª:

Vistas las antecedentes diligencias practicadas por el Agrimensor de esta Provincia Dª Carlos Trudeau sobre la posecion que ha dado al Sᵒʳ Dª Juan Filhiol Comandante del Puesto de Oachita de un terreno de una Legua quadrada situada en el Distrito de Arcansas sobre el lado por el norte del Rio Oachita como dos leguas y medio distante del dicho Rio Oachita y ontendido de qᵘ este Terreno sera media de manera que se incluera el sitio, o paraje conocida por el nombre de los Aguas calientes y demas que expresa el Plano figurativo y certificacion del dicho Agrimensor Trudeau que antecede y reconociendo esta reglada al orden del Agrimensura, aprovando como provamos estas diligencias usando de la facultad que el Ray nos tiene concedida, ortogamos en su Real nombre al dicho Juan Filhiol el referido legua de tierra para que como propias dispanga de allos y los usufrute. Damos la presente firmada de neustra sellada con el sello de nuestras Armas y refrendada por el infrascrito por S. M. de este Gobierno e Intendencia. En la Nueva Orleans a veinte y dos de Febrero de mil setecientos ochenta y ocho—

[L. S.] ESTÉVAN MIRO.

Por mᵈᵒ de su Sʳⁱᵃ
ANDES LOPEZ ARMISTO.

Registrado.

The following is a true and correct translation into the English language of said grant:

Governor of the royal armies and intendant of the province of Louisiana and West Florida and inspector of his troops, etc.:

Having examined the foregoing record of the proceedings taken by Don Carlos Trudeau, surveyor general of this province, concern-
in- the possession which has been given to Senor Don Juan
6 Filhiol commandant of the post of Ouachita, of a tract of land one league square situated in the district of Arkansas, on the north side of the River Ouachita, at about two leagues and a half distance from the said River Ouachita, it being understood that this tract of land shall be surveyed so as to include the place known by the name of Hot Waters, as is beside expressed in the figurative plan and certificate of the said surveyor Trudeau, above named, and recognizing the same to have been made in conformity to the order of survey, approving as we do hereby approve the said proceedings, using the faculty which the king has vested in us we

do hereby grant in his royal name unto the said Don Juan Filhiol the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

We give these presents under our hand, sealed with the seal of our own arms, and attested by the undersigned secretary of His Majesty in the government and intendance.

In New Orleans, in the 22nd day of February, 1788.

[L. S.] ESTEVAN MIRO.

By mandate of His Excellency;
ANDES LOPEZ ARMISTO.

Registered.

That in and by the said grant the said Don Juan Filhiol, the ancestor of the plaintiffs, was duly and fully vested with an absolute title to the said tract of land of one league square, without any other or further act by him to be done and performed. But that after the making and delivering of said grant to the said Don Juan Filhiol by the said Miro, as governor of said province, as aforesaid, to-wit, on the sixth day of December, 1788, one Carlos Trudeau, who was then the royal and special surveyor of the province of Louisiana made, executed and delivered a certificate of survey of said grant of land to said Don Juan Filhiol which certificate of survey so made and delivered is in the Spanish language and
7 is in the words and figures following to-wit:—

Dⁿ Carlos Trudeau, agrimensor Real y Particular de la Provincia de la Luisiana en Consequencia de un Memorial firmado el dia doce de Diciembre del ano mil setecientos ochenta y siete por Dⁿ Juan Filhiol Commandant del Puesto del Oachita y de orden de su Senᵃ el Sʳ Dⁿ Esteban Miro Brigadʳ de los Rˢ Exˢ Gobʳ intendente de la provᵃ de la Luisiana florida Occidental &c. con fecha el dia 22 de Febᵒ de 1788 mandandome de dar possession al antedicho Commandante un terrano de una legua quadrada situada en el distrito de Arkansas que se incluara aquel paraje conocida por el nombre de los Aguas Calientes, y en Conformidad del entedicho Orden Certificio aver medido a favor del antedicho Comᵗᵉ Sʳ Dⁿ Juan Filhiol la legua de tierra indicada por el Memorial situada sobre el lado del norte del rio Oachita en el distrito de Arkansas Como dos leguas medio distante del dicho Rio Oachita, que sera verificado por el plano figurativo que acompane armados en Conformidad del apeo del dia Seis del present mes de Diciembre y del Corriente ano de mil Seticinetos Ochenta y Ocho ano.

CARLOS TRUDEAU.

Don Estevan Miro Brigadier.

The *the* following is a true and correct translation into the English language of the said certificate:

Don Carlos Trudeau, royal and special land surveyor of the

province of Louisiana, in consequence of a memorial signed on the 12th day of December of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency Don Estevan Miro, brigadier of the R. ex gob., intendant of the province of Louisiana, West Florida etc., dated the 22nd day of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land one league square, situated in the district of Arkansas, to include that spot known by the name
8 of Warm Waters. and in conformity with the aforesaid order, I certify having served in favor of the aforesaid commandant, Don Juan Filhiol the league of land indicated in the memorial situated on the north side of the Ouachita river in the district of Arkansas, at about two leagues and a half distant from said river to be varified by the figurative plan which accompanies in conformity with the actual survey of the 6th of the present month of December and of the current year 1788.

CARLOS TRUDEAU.

Don Estevan Miro, brigadier.

That the making and delivering of said certificate by the said Trudeau was a delivery of the judicial possession of said land, and had the force and effect of segregating the said tract from the public domain, and with the grant aforesaid vested full and complete title thereto in said grantee.

The plaintiffs further state that the original survey, figurative plan and process verbal, so made as aforesaid, by the said Trudeau as surveyor general has become lost and perhaps destroyed, but that they can, as they verily believe, prove the contents thereof with substantial completeness and accuracy, if they shall be unable to recover the originals.

The plaintiffs further state that in the year 1799, and on the 17th day of July, 1799, —— Morales was the governor of the said province of Louisiana, by authority and appointment of the King of Spain, and on said day, in the exercise of royal authority, made and promulgated a regulation of law to govern the future conveyance of land in the province by the subjects of the King of Spain of which the following is a copy, to-wit:

To avoid for the future the litigations and confusions of which we have examples every day, we have also judged it very
9 requisite that the notaries of this city and the commandants of the posts shall not take any acknowledgement of conveyance of land obtained by concession, unless the seller (grantor) presents and delivers to the buyer the title which he has obtained and in addition being careful to insert in the deed the metes and bounds and other descriptions which result from the title and the procès verbal of the survey which ought to accompany it.

Said plaintiffs further state that the said Don Juan Filhiol, their said ancestor, did sell and convey by deed the said league of land described herein to his son-in-law Narcisso Bourgeat, on the 25th

day of November, 1803; that said deed from said Don Juan Filhiol to the said Narcisso Bourgeat was passed before Don Vinciente Fernandez Texiero, lieutenant of the regiment of infantry and military and civil commandant of the district and jurisdiction of Ouachita, which deed was witnessed by Senor Baron de Bastrop and Don Jose Pomet who signed the act in the presence of Don Alex Breard, Don Carlos Bettin, and Don Francisco Carvet, all of whom were principal men in Ouachita at the date thereof; that said deed from Don Juan Filhiol to the said Narcisso Bourgeat is in the Spanish language but which when translated into the English language is as follows to-wit:—

"Be it known to all to whom this act may come, that I Don Juan Filhiol, captain in the army, commandant of the militia of this district do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law, and resident of this district a tract of land with a front of eight--four arpens, and a depth of forty-two arpens on each side of the stream called "La Source d'Eau Chaude," about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the crown, the same which belomgs to me by virtue of a grant obtained -rom Senor Don Estevan Miro, then governor of these provinces, dated the 12th day of December, 1787. I sell the same to the above named Bourgeat with all its ways of entrance and exits, uses, stated customs and servitude, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowle-ge the receipt, and to obviate the actual receipt thereof at this moment, I renounce the exception of *numerata pecunia* and do formerly authenticate that I receive it; wherefore I abandon and relinquish all title, possession, use, dominion seigniory I may have had, or held in and to said tract of land, and do grant unto and renounce in favor of, and transfer to this purchaser all of such title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction, and to insure the reality and perfection of this sale, I hereby effect and obligate thereto all the property I now have, or may have hereafter, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular. And being present at the passing of this act, I, the above named Narcisso Bourgeat, accept the same, acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of

Ouachita on the 25th day of the month of November, one thousand eight hundred and three.

I, Don Vincente Fernandez Texiero, lieutenant of the regi-
11 ment of infantry of Louisiana, and military and civil com-
mander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron De Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Bettin and Don Francisco Cavet, all of whom are residents of this district.

The interlineation Cavet is part of this act and the erasure Bettin is not.

JUAN FILHIOL.
NARCISSO BOURGEAT.

Before me the commander
VINCENTE FERNANDEZ TEXEIRO.

BARON DE BASTROP.
J'E POMET.

Which deed was immediately thereafter duly reported in the proper office of the province of Louisiana, in accordance with the law then existing, and was afterwards duly recorded in said office.

Copies of the said deed and the deed of retrocession from said Bourgeat to Filhiol, hereinafter mentioned, in the original Spanish and French language, properly certified by the officers in charge of them, attached and endorsed thereon are herewith filed, marked, respectively, Exhibits "X" and "Z," the originals still being kept on file as required by law.

That the said Narcisso Bourgeat retroceded the same lands sold to him, as aforesaid by the said Don Juan Filhiol, to the said Don Juan Filhiol by a deed passed before J. Poydras, judge of the court of the parish of Pointe Coupee, July 17th, 1806; that their said ancestor Don Juan Filhiol never thereafter parted with his said title to said land.

That the said deed from the said Narcisso Bourgeat to the said
Don Juan Filhiol was filed for record and recorded in the office
12 of the recorder of the parish of Pointe Coupee, in the State of
Louisiana, on the 17th day of July 1806, and that said deed, together with a certificate of recordation, are as follows said deed being in the French language, but here translated into the English language, to-wit:

I, the undersigned Narcisso Bourgeat, retrocede, by these presents to Monsieur Juan Filhiol a piece of land three leagues front and one in depth, situated on the Bayou Darquelon, and one also of a league square, situate at the source of the Hot Water of the Ouachita, the which lands he sold me by deed given before Don Vincente Frenandez Texier commandant at the time at said Ouachita, and which I return to him for the same price and sum which he had

parted with to me, and which he has reimbursed me, and therefore I hold him released, in order that he may enjoy it, appertaining as his right, in behalf of which I have signed at Pointe Coupee the 17th of July, 1806.

NARCISSO BOURGEAT.

I certify that the present retrocession has been made in my presence the same day as that above.

J. POYDRAS,
Judge of the Court, Pointe Coupee.

The plaintiffs further state that at the time said Filhiol executed said deed to the land in question to said Bourgeat, he in accordance with the requirements of the Spanish law, actually produced before Vincente Fernandez Texeiro, and then and there actually delivered to said Bourgeat all his title papers, including the certificate of survey, figurative plan and procès verbal, grant etc., the same having been found to be valid, and when said retrocession was made all the title papers were produced, before the officer by whom the deed was witnessed, and were actually delivered
13 to the said Filhiol.

Plaintiffs further state that their ancestor, the said Don Juan Filhiol, after the retrocession to him of said square league of land, as aforesaid, and after the Indian right of occupancy had been extinguished in 1818, made efforts to render the same available to the valuable uses to which it was and is by nature available, and in the year 1819 effected a lease in writing of the Hot Springs thereon to one Stephen P. Wilson, a doctor of medicine, for a period of five years, with a view to the improvement of the same and the opening of such medicinal waters to public use. That the said lessee, Dr. Wilson, did under said lease enter possession thereof in the year 1819, and made some improvements and continued for some period in such occupation, with the purpose to attract thither those who might be in necessity for the use of such waters for healing. But that not long after, in the year 1821, the plaintiffs' said ancestor, Don Juan Filhiol, died as hereinbefore stated; that the region of country in which said land was situated was remote from settlements, and inaccissible without much difficulty and risk to those who might be benefited by the medic-al properties of the Hot Springs there, and fu-ther efforts to then render them available were for many years impracticable. That since the death of their said ancestor, plaintiffs have always urged their title to the said property and employed agents and attorneys to do so for them, but that during nearly all of this interval they have been embar-assed by the want of the said original grant for said land, the same having without the knowledge of the said heirs of the said Filhiol, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants, and who died in 1843. Often and repeated searches were made by the said plaintiffs for said grant, but that they

failed to find it; that lately to-wit: on or about the — day of
14 ——, 1883, said original grant from said Don Estevan Miro, the Spanish governor general, of the province of Louisiana to the *the* said Don Juan Filhiol was found by Mrs. Matilda E. Moore of New Orleans parish, Louisiana, among the effects of her mother, who was the widow of the said Resin P. Bowie and that said grant was delivered by said Matilda E. Moore to Margaret A. Muse, who was a daughter of Narcisso Bourgeat and Marie Barbe Filhiol and a granddaughter of Don Juan Filhiol, in the year 1883; that printed copies of the affidavits of Matilda E. Moore, Ellen M. Coates, and Margaret Adelaide Muse and Hippolite Filhiol, as to the finding and delivery of said original grant and certificate of measurement or survey of the said Carlos Trudeau marked 1, 2, 3, and 4, are attached hereto and filed herewith.

That said Don Juan Filhiol at the time of his death was and for more than forty years theretofore he had been a citizen and inhabitant of the Territory of Louisiana, and by virtue of the several grants and instruments of writing hereinbefore set out the said Don Juan Filhiol has become the owner and at the time of his death was the owner and in possession of a league of land being a tract of about three miles square, embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas, and including a parcel of land for which the plaintiff- bring this suit and which for convenience, is hereinafter designated as the land in controversy the same being described as follows:—

An irregular tract or plot of ground known as the site of the Army and Navy general hospital, upon which, and within the boundaries of which was built and is now standing the building, used and occupied and known as said Army and Navy general hospital, being the lot described on the records of the Interior Department as the site for said hospital in said city of Hot Springs; tha exact deccription by measurement or metes and bounds
15 being to the plaintiffs unknown. That plaintiffs duly applied to the Secretary of the Interior for a copy of the official description of said lot or tract as set out in the records and filed of the Interior Department, which application was refused and denied.

And for cause of action these plaintiffs say that by the third article of the treaty between the United States and the Republic of France, ratified on the 21st day of October, 1803, by which the province of Louisiana was acquired by this Government it was agreed and established that the inhabitants of said province should among other things, "be maintained and protected in the free enjoyment of their * * * property;" that such provision, by a just construction of said treaty extended to the property of the said Don Juan Filhiol, the plaintiffs' ancestor, so as aforesaid granted to him, and also to the rights of these plaintiffs as his heirs in and to the same, and so far forth qualified the rights of property acquired by the United States thereunder; but that, nevertheless denying that these plaintiffs were entitled to be maintained and protected in such enjoyment of their said property by any construction of said

treaty, the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained, and prior to the commencement of this suit did by their officers and agents, expell the plaintiffs from possession of the said land last above described, which is parcel of the aforesaid grant to their said ancestor, and did deliver over such possession to the defendant in this action some time before the commencement thereof, to wit, on the first day of January, A. D. 1900, and did then establish him in such possession thereof wrongfully and unjustly; that since said date and for more than two years, the said defendant has so remained in possession of said land in controversy claiming the same
16 for the United States as superintendent of the U. S. Army and Navy hospital ousting the plaintiffs and denying their right thereto, by direction of the United States and in pursuance of the unlawful and unjust possession so given by them to him, and without any other right or claim of right thereto, on the part of said defendant except as such superintendent and as a public officer of the United States. And that the cause of action of these plaintiffs against the said defendant arises out of said treaty and draws in question the construction thereof.

And also these plaintiffs say that they were by inheritance from their said ancestor lawfully possessed of the land in controversy, as parcel of said grant to him made as aforesaid, but that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation to these plaintiffs, and did as aforesaid by their officers and agents expel these plaintiffs from possession of the land in controversy, and before the commencement of this action to-wit: on the first day of January, A. D. 1900, established the defendant in possession thereof wrongfully and unjustly, and so he has since remained as aforesaid pursuant to such acquisition of possession by him, and by direction of the United States, and without other right or claim of right thereto, and has all said time ousted these plaintiffs. And so their cause of action arises under the Constitution of the United States and involves the application thereof for the protection of their just rights.

The land and building in controversy are of the value of fifteen thousand dollars, and the rent thereof, with the buildings thereon, is of the value of two thousand dollars per annum.

Wherefore plaintiffs pray judgment for possession of said land in controversy and for five thousand dollars rent thereof, as
17 damages, and for other relief.

(Signed) W. S. AND F. L. McCAIN, *For Pl'ffs.*

Endorsed: Filed and writs issued August 14th, 1902, W. P. Feild, clerk.

18 EXHIBIT "X."

Sepan quontas esta carta vienen como yo Don Juan Filhiol, capitan de exto y comandante de lilicias de este puerto que otorgo que vendo realment y con efecto d Don Narcisso Bourgeat hierno y vecino de este distrito una tierra de ochenta y quartro arpanes de frente y quaranta y dos de produndidad a cada lado del rio llamado de la "Source de Eau Chaude" distante de su entrada en el del Ouchita como de dos leguas teniendo el manantial de Aquas Calientes par centro corriendo sus limites a la profundidad leste, oeste, paralelas, limitado por ambos lados con tierras realengas, la misma que me pertenence por averla obtenido de consecion del Sor Don Estevan Miro Gebernado de estas provincias entonces, en fechada doce de Diciembre del Uno de Mil Setecientos Ochenta y siete y vela vendo al ante, dicho con todas sus entrados y validos usos costumbras duenos y servidumbres libre todos gravaman e hipoteca en el precio de mil y dos cientos prosos fuertes que me ha pagoda de contado de cuya cantidad me doy por entregado a mi voluntad y por no ser de presente la entrega renuncio la escepion de la non numerata pecunia y ortaga formal recibo, mediante lo qual me aparto y separo del dueno de propriedad posescion utis Dominio y Senoria que a dicha tierra avia y tenia y todo lo cedo renuncio y trapaso en el comparador y en que su causa dueno huvierepor que como proprio suyo la posea venda cambie o enagene a su voluntad por esta escritura que a su favor otorgo en senas de real entrega conto que ha de ser visto aver adquirido su posecion sin que resesite deotra prieva de que lo relevo y me obligo a la evicion seguridad y saneamiento de estra venta en toda forma de Dueno con mis bienes avidos y por a ver doy aqui por incenta la clausa la quarantia y renuncio los leyes de mi favor con la gral en-

19 forma y estando presente al ortogamiento de esta escritura, yo el referido Don Narcisso Bourgeat la acepto a mi favor recibiendo comprada dicha tierra en la cantidad y conformidad que me va vendida de ella me doy—por entregada a mi voluntad, y otorgo formal recibo. En cuyo testimonio es fecha la carta en el Puerto de Ouachita a los veinte y cinco dias del mes de Novienbre del ano Mil Ochocientos y tres yo Don Viz Teru Fejerio Teniente del regimento infanteria de la Louisana y comandante militar y politico de este Puerto y su jurisdicion certifico—conozco a los otorgantes que firmaron siendo testegos de asistencia el so Baron de Bastrop Du Josif Pomet presencia de Don Alexandro Breard, Don Carlos Bettin y Du Francisco Cavet todos de este vecindario entre renglones Cavet—vale bettin—rayado—no vale.

NARCISSO BOURGEAT.

JUAN FILHIOL.

Anto mi Comandante VIZ. FENR. FEJERIO.

BARON DE BASTROP.
Y. POMET.

[SEAL.]

Be it known to all to whom this act may come, that I, Don Juan Filhiol, captain in the army, commandant of the militia of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law, and resident of this district, a tract of land with a front of eighty-four arpens, and a depth of forty-two arpens on each side of the stream called "La Source d'ear Chaude" about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to it- full depth, and bounded on both sides by lands belonging to the crown the same which belongs to me by virtue of a
20 grant obtained from Senor Don Estevan Miro, the then governor of these provinces, dated the 12th day of December of the year 1787. I sell the same to the above named Bourgeat with all its ways of entrance and exits, uses, stated customs and servitudes, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowledge receipt and to obviate the actual receipt therefor at this moment, I renounce the exception *nemerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession, use, dominion of seignory I may have had, or held in and to said tract of land and do grant unto and renounce in favor of, and transfer to this purchaser all such title and rights thereto, and in whom such a right and title may be that he may possess, sell exchange alienate according to his own wish, as set forth in this writing which I pass in his favor in testimony of real delivery of said property, so that it may be seen and understood that he acquir-s possession thereof without any proof of which he is hereby relieved, and to secure him against eviction and to insure the reality of this sale, I hereby effect and obligate thereto all the property I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular and being present at the passing of this act I, the above named Narcisso Bourgeat accept the same—acknowledging to have purchased the said land in quantity and shape as herein sold to me, which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed in the district of Ouachita on the 25th day of the month of November, one thousand eight hundred and three.

I Don Vincente Fernandez Texiero lieutenant of the regi-
21 ment of infantry of Louisiana and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present and assisting in the

presence of Don Alexander Breard, Don Carlos Betin and Don Francisco Cavet, all of whom are residents of this district.

JUAN FILHIOL.
NARCISSO BOURGEAT.

Done within my jurisdiction.
VINCENTE FERNANDEZ TEXIERO.

BARON DE BASTROP.
TN POMET.

STATE OF LOUISIANA, }
Parish of Ouachita. }

I hereby certify that the above and foregoing is a true and correct copy of the original deed on file and of record in the notarial records of this parish.

Witness my signature and seal of office this 10th day of June, 1889.

(Signed) R. A. YOUNG,
Deputy Clerk Fifth District Court and
[SEAL.] *Ex-officio Recorder and Notary Public.*

22 EXHIBIT "Z."

I the undersigned Narcisso Bourgeat, retroceed by these presents to Monsieur Jean Filhiol a piece of land of three leagues front and one in depth, situated on the Bayou Darquelon; and one also of a league square situate at the source of the Hot Water of the Ouachita, which lands he sold to me by deed given before Don Vincente Fernandez Texario commandant at that time at said Ouachita, and which I return to him for tha same price and sum which he has parted with to me and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it appertaining as his right in belief of which I have signed at Pointe Coupee the 17th day of July, one thousand eight hundred and six.

(Signed) NARCISSO BOURGEAT.

I certify that the presented retrocession has been made in my presence the same day as that above stated.

(Signed) J. POYDRAS,
Judge of the Court of Pointe Coupee.

23 Je soussique Narcisso Bourgeat retorcede par ce presente a Monsieur Jean Filhiol, une terre de trois leines de face une de profondeur, situee sur le Bayou Darquelon; et une idam d'une liene enquarri, situee a la Source d'Eau Chaude au Ouachita les quelles terres il m'a vendu par actepasse pardevant Don Vincent Fernandos Texcico, commandant pu pour lor au dit Ouachita, et que je lui buivavends pour le meme pui et somme quil me les avait

laisse et qu'et qu ma rem bouise at pour quoi je le tiens quotte pour quid en jousse comme d'an lieu a lai appurtenant en foi de quoi ai signe a la Ptr. Coupie la dixept Juillet mil huit cent six.

(Signed) NARCISSO BOURGEAT.

Je certifie que la presente retrocession a ete fait et au gendessus.

(Signed) J. POYDRAS,
Juge du Conte de la Ptr. Coupie.

STATE OF LOUISIANA,
Parish of Pointe Coupee.

I the undersigned clerk and *ex-officio* deputy clerk and recorder of mortgages certify that the foregoing and herewith is a true copy of the original on file and of record in this office which original has been duly recorded in this office on the 17th day of July, 1806 under No. 2607.

Witness my official signature and seal of office, this 1st day of June, 1889.

[SEAL.] (Signed) A. J. DAYINS, *Recorder.*

24 EXHIBIT No. 1.

STATE OF LOUISIANA,
Parish of Orleans.

Mrs. Matilda E. Moore, widow of Joseph H. Moore, of the above parish and State, being duly sworn, deposes and says that she was born at Opelousa, Louisiana, August 15th, 1817, and is a daughter of Resin P. Bowie deceased, who was a land agent versed in the practice and prosecution of Spanish and French land claims.

Deponent further declared that she heard her father and James Fort Muse, husband of Mrs. Margaret A. Muse, one of the heirs of Don Juan Filhiol, speak together about the claim the heirs of said Filhiol have to Hot Springs in Arkansas; that she knows that the said heirs have for many years claimed and attempted to establish their rights to said property. Deponent further declares that her father, Resin P. Bowie, died about the year 1841, and that he left a large number of papers relating to land claims; that after his death, parties applied to her mother, and herself for documents relative to the Hot Springs claim of the Filhiol heirs; that search was made among her father's papers for them, but without success; that the greater part of her father's papers relating to land claims were taken possession of and carried off by one John Wilson who had been interested with her father in the prosecution of land claims, and she was under the impression the Hot Springs papers were among those carried off by Wilson. Deponent further declares that her mother, widow of said Resin P. Bowie, died about August 25th, 1875; that after her death, while looking over her effects, deponent found in an old trunk, containing relics and papers which

had belonged to her mother, she found a package of papers
25 rolled in an old newspaper marked "Papers belonging to Mrs. Bowie," which on examining, she exclaimed, "Why, here are Mrs. Muse's Hot Springs papers." Deponent declares that said package contained the original grant to Don Juan Filhiol by Estevan Miro, a certificate of survey signed Carlos Trudeau and a pen and ink sketch or plat of survey, and other papers. Deponent further declares that she gave said package of papers to Mrs. Mar*agaet* A. Muse, widow of the aforesaid James Fort Muse, some time during the year 1883. Deponent further declares that the pen and ink sketch or plat of survey, which accompanied the papers delivered by her to Mrs. Muse, was similar in appearance to the plats or plans of surveys of French and Spanish grants, and was executed on paper similar in appearance to the paper upon which are written the grants by Miro and the certificate of survey by Trudeau, and was signed by Carlos Trudeau.

(Signed) MATILDA E. MOORE.

Sworn to and subscribed to before me this 20th day of September 1889, A. D.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 1½.

STATE OF LOUISIANA, }
Parish of Orleans. }

MRS. Matilda E. Moore, widow a resident of the above parish and State, being duly sworn, deposes and says she has sufficient knowledge of the Spanish language to know the purport of a grant written in that language, and that she is familiar with the form and appearance of land grants made by the French and Spanish governments, having seen a number of them in the possession of her father while he was engaged in attending to land claims.

(Signed) MATILDA E. MOORE.

26 Sworn to and subscribed before me this 5th day of October, 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 2.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Ellen M. Coates, widow, a resident of the city of New Orleans, being duly sworn, deposes and says she is a daughter of James Fort Muse and Margaret A. Bourgeat, and a great grand-daughter of Don Juan Filhiol, who was commandant of the post of Ouachita from 1783 to 1800, and to whom Don Estevan Miro, governor of the province of Louisiana, made a grant in 1788 of a league square of

land in the district of Arkansas, so as to include the Hot Springs. Deponent further declares that Don Juan Filhiol and his heirs, after his death in 1821, always claimed said lands as theirs under the aforesaid grant. That for more than fifty years the heirs have made continual efforts to obtain possession of said property and to establish their rights, employing skilled agents and attorneys for that purpose, among other agents, one Resin P. Bowie, who died about the year 1841. Deponent further declares that the original grant papers for the aforesaid property were mislaid or suppressed until the year 1883, when one Mrs. Matilda E. Moore, a widow, a resident of the city of New Orleans, and a daughter of the aforesaid Resin P. Bowie, delivered to deponent's mother Mrs. Margaret A. Muse, the said grant papers, saying she had found them in an old trunk in which her mother, widow of the said Bowie, had kept her private and family relics. Deponent further declares that the claim of the Filhiol heirs is based on a complete grant; that up to the year 1870 the claimants for lands in Arkansas under complete grants had
27 no way of proceeding against the United States, either in court or before the Land Department, as allowed in other States by divers acts of Congress but that by act of Congress approved June 11, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas," but ninety days were allowed claimants in which to file suits in the Court of Claims, while in other States years were allowed; that during the time allowed by the aforesaid act one Thomas S. Drew of Arkansas, was the agent of the heirs of Filhiol; that he obtained many documents and papers relating to their claim from them, but he failed either to file suit in the Court of Claims or to bring their claim to the notice of Congress; that without notice to the heirs, he summarily abandoned their case, and they have never been able to recover the papers placed in his hands, he having left Arkansas; that after his defection, and after the expiration of the time allowed by the aforesaid act, in October, 1873 the claim was placed in the hands of Judge W. J. Q. Baker, of Monroe, who after taking a large amount of testimony and attempting to obtain legislative action by Congress, which he asserted was prevented by the opposition of the suitors for the same property, then in the Court of Claims and the expiration of the session of Congress, either abandoned the case or died while prosecuting it.

Deponent further declares that since the recovery of the original grant papers in 1883, the want of which has always been asserted to be the stumbling block in establishing the claim, she has been acting for her mother, whose great age has prevented her taking any active part in attending to this claim, and has made every effort to procure the necessary legal assistance to prosecute it; that she has submitted the papers to several lawyers for examination, with the view of placing the claim in their hands for prosecution, but on account of her moderate means, without success until
28 the present year; that the numerous heirs of Don Juan Filhiol are scattered in Louisiana, Mississippi, Texas, and Mexico;

that the necessity of unity of action on their part, the great distance seperating them and the difficulty in communicating with them, together with the lack of means to obtain legal assistance, has caused the apparent delay in the application for relief, and it was only in the present year that her present attorney informed her that the *Congress* of the United States would grant the heirs upon a proper showing the same facilities allowed to other claimants to prosecute their rights in the courts of the country.

ELLEN M. COATES.

Subscribed and sworn to before me this 19th day of September A. D. 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

29 EXHIBIT No. 3.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Margaret Adelaide Muse widow, of the above parish and State being duly sworn deposes and says that she was born December 5th, 1803, and is the daughter of Narcisso Bourgeat and Marie Barbe Filhiol, and a grand-daughter of Don *F*uan Filhiol, who was Spanish commandant of the post of Ouachita from 1783 to 1800, and to whom Don Estevan Miro, governor of the province of Louisiana, on Feburary 22nd, 1788 made a grant of a league square of land in the district of Arkansas so as to include the Hot Springs; that she married James Fort Muse, a lawyer February 22nd, 1821, and that he died January 14th, 1843. Deponent further declar-s that in 1803 he- grandfather, Don Juan Filhiol, sold the tract of land granted as above to her father, Narcisso Bourgeat; that in 1806 Narcisso Bourgeat retroceded the same land to Don Juan Filhiol; deponent further declares that the original grant papers to the aforesaid land were lost to the Filhiol heirs until a few years since, when Mrs. Matilda E. Moore, a resident of the city of New Orleans, widow and a daughter of one Resin P. Bowie, who, about the year 1840, had been employed by the Filhiol heirs to prosecute and establish their title to the above land, delivered to deponent the original Spanish grant of Don Estevan Miro and the cirtificate of survey of Don Carlos Trudeau, royal surveyor of the province of Louisiana showing a survey by him of the league square of land granted above so as to include the Hot Springs in Arkansas, saying she had found them in an old trunk which had not been opened for years, among other relics of her mother, deceased wife of the aforesaid Resin P. Bowie. Deponent further de-
30 clares, that prior to the recovery of the original grant papers aforesaid, she and the other heirs had used due diligence in prosecuting their rights under said Spanish grant, and had agents and attorneys employed continuously for that purpose for more than fifty years. Deponent declares that the documents handed to her

by the aforesaid widow Moore consisted of the original grant, the certificate of Trudeau, royal surveyor and a pen and ink sketch or plat of survey and other papers. Deponent further declares that, owing to her great age, she is unable to take any active steps in pushing the claim for the aforesaid lands, and has put the papers in the hands of her daughter, Mrs. Ellen Muse Coates, of New Orleans for that purpose.

(Signed) MARGARET A. MUSE.

Subscribed to and sworn before me this 20th day of September, 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 4.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Hippolite Filhiol of the above parish and State, being duly sworn, deposes and says that he is a son of Edmond Landry Grammount Filhiol and a grandson of Juan or Jean Filhiol who was Spanish commandant of the post of Ouachita from 1782 to 1800, and to whom was granted by Don Estevan Miro, governor of the province of Louisiana in 1788, a tract of land one league square so as to include the Hot Springs in the district of Arkansas. Deponent declares that the said grant papers to said land were lost or
31 mislaid for several years; that since the death of Don Juan Filhiol in 1821 his heirs have made repeated and continued efforts to substantiate their claims to said land, having employed numerous lawyers and agents versed in the land laws and practice to prosecute it, but owing to the loss of the original grant papers, their said agents have never been able to prosecute their claim to a finality; that these agents, after investigating this claim and obtaining all the supporting evidence in the possession of the heirs, have one after the other abandoned its prosecution for want of the original grant papers from the Spanish government, and that many of the documents placed in the hands of these agents supporting their tittle the heirs have never been able to recover; that since the expiration of the time allowed by the act of Congress for the instituting of proceedings for the Hot Springs, entitled "An act in relation to the Hot Springs reservation in Arkansas," approved June 11th, 1870, (U. S. Stats., vol. 16, p. 149). Deponent is informed that Mrs. M. A. Muse, one of the heirs of said Don Juan Filhiol, has recovered the original grant papers to Don Juan Filhiol which will enable his heirs to substantiate and establish their claim to the said tract of land.

(Signed) H. FILHIOL.

Sworn to and subscribed before me this 6th day of September, 1889.

(Signed) ROB'T RAY,
[SEAL.] *U. S. Commissioner.*

32 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 7th day of April anno Domini, one thousand nine hundred and two at the United States court room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber U. S. district judge presiding and holding said court, the following proceedings were had, to-wit:

Before the clerk in vacation, September 1st, 1902.

HIPPOLITE FILHIOL ET AL.
vs. 5224.
GEORGE H. TORNEY.

Comes the defendant by William G. Whipple Esq., district attorney and files herein his demurrer to complaint.

Which demurrer to the complaint is in the words and figures following to-wit:—

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

Now comes the said defendant George H. Torney by William G. Whipple Esq., United States attorney, and demurs to the complaint filed *filed* herein and for cause of demurrer states that it appears upon the face of said complaint:

First. That the court has no jurisdiction of the subject of this action.

Second. That the complainant does not state facts sufficient
33 to constitute a cause of action.

(Signed) WILLIAM G. WHIPPLE,
United States Attorney.

Endorsed: Filed September 1st, 1902. W. P. Feild, clerk.

34 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 20th day of October anno Domini, one thousand nine hundred and two at the United

States court room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. district judge presiding and holding said court, the following proceedings were had, to-wit: on December 5th, 1902.

HIPPOLITE FILHIOL
vs.
GEORGE H. TORNEY. } 5224.

Comes the plaintiff by *by* W. S. and F. L. McCain Esqs., his attorneys and comes the defendant by William G. Whipple Esq., district attorney and it is ordered by the court that the demurrer heretofore filed be set down for hearing for December 15th, 1902, and the clerk is directed to notify the parties of the court's action herein.

And on December 15th, 1902 the following proceedings were had towit:

HIPPOLITE FILHIOL
vs.
GEORGE H. TORNEY. } 5224.

Comes the plaintiff by W. S. and F. L. McCain Esqs., his attorney- and comes the defendant by William G. Whipple Esq., his attorney and by agreement of parties it is ordered that the argument of the demurrer which was set down for this date, be continued to January 5th, 1903.

35 And on December 31st, 1902, the following proceedings were had to wit:

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY. } 5224.

Comes the defendant by William G. Whipple Esq., United States attorney and by leave of court files herein his answer to complaint and exceptions to exhibits.

Which answer and exceptions are as follows:

36 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, HARRIET L. WATKINS, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette W. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by Their Mother and Next Friend, All Residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, All Residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford, Residents of the State of Mississippi; Mary A. Bres, Resident of the State of Illinois; Ellen M. Parker, Resident of the State of California; George B. Muse and Mary L. Muse, Residents of the State of Minnesota; Malvina R. Muse Bowman, Resident of the State of Wisconsin; Bessie Muse, Resident of the State of Iowa; James Fort Muse, Resident of the State of Oregon; Mary E. Behen, Resident of the State of Missouri; Alice F. South, Resident of Mexico, and Victoria A. Horton Bartholomew, Now Mrs. J. D. A. Harris, Resident of the State of Washington; Frederick Horton and Joseph E. J. Muse, Residence Unknown, Plaintiffs,

vs.

GEORGE H. TORNEY, Defendant.

Answer to Complaint at Law.

Now comes George H. Torney, the defendant in the above-entitled suit, by William G. Whipple, Esq., United States attorney,
37 duly authorized to appear herein for said defendant by Hon. H. M. Hoyt, acting Attorney General of the United States, by letter of instructions dated August 29th, 1902, a copy of which letter is hereto annexed, marked "Exhibit A," and makes answer to the complaint of the said plaintiffs, Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette W. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, Eugene and Cecil Muse by their mother and next friend Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, Lizzie S. Cochran, Robert R. Sanford, Charles C. Sanford, Mary A. Bres, Ellen M. Parker, George B. Muse, Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse, James Fort Muse, Mary E. Behen, Alice F. South, Victoria A. Horton Bartholomew, now Mrs. J. D. A. Harris, Fredrick Horton and Joseph E. J. Muse, in the above-entitled suit named, and for answer thereto says:

That as to whether the said Don Juan Filhiol was a citizen and resident of the State of Louisiana in the year 1821; and as to whether

he died intestate; and as to whether the said other plaintiffs herein are citizens of the United States or are descendants of the said Filhiol or his only descendants and heirs; and as to whether each and every one of the descendants of the said Filhiol who are dead died intestate so far as the lands described in said complaint are concerned; and as to whether said Fil-
38 hiol was born in the year 1740; and as to whether he ever settled in Louisiana or when he did so; and as to whether he was appointed by the King of Spain or any other official a captain in the army of the King of Spain or a commandant of his militia and was assigned to duty at the post of Ouachita, Louisiana, under Don Estevan Miro as governor general of the province of Louisiana; and as to whether during the years from 1783 to 1789, inclusive, said Don Estevan Miro was the governor general of the province of Louisiana under and by authority of the King of Spain and was by the King of Spain duly authorized to represent the said king as his regent and governor to do such acts and make such grants of land in the said province as the king himself might do and make; and as to whether during the same period one Don Carlos Trudeau was the royal surveyor general of said province, appointed by the said king and vested with the powers appertaining to such office by the laws of Spain; and as to whether said Miro and said Trudeau, as such officers, respectively, were duly authorized to perform all the acts stated in said complaint to have been done by them respectively; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether on the 12th of December, 1787, or at any other time, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land; and as to whether the said governor ordered the land applied for to be
39 surveyed; and as to whether Don Carlos Trudeau, as surveyor general of the said province, ever made a survey of said land before the 22nd day of February, 1788, or at any other time, in accordance with the existing law, or otherwise; and as to whether he made a report thereof, with figurative plan, procès verbal or certificate of description of the land to be granted, in and by which the said land was described as set forth in said complaint, or otherwise; and as to whether upon the report of said surveyor general and said figurative plan, procès verbal or certificate of description made and returned to him the said Governor Don Estevan Miro, in his capacity as representative of the King of Spain, or in any other capacity, did then make and deliver to the said Don Juan Filhiol a royal grant for a certain league of land represented on said figurative plan and described in said procès verbal or certificate of description by said surveyor general; and as to whether such royal grant is now in the possession of said plaintiffs; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether the said grant of land as alleged in said com-

plaint was made to said Don Juan Filhiol while he was acting as commandant of the post of Ouachita as a reward for his civil and military services, or for distinguished services by him rendered to the King of Spain; and as to whether the said Don Estevan Miro, as said alleged governor general of Louisiana, was by the Spanish laws vested with the power to make said grant and to convey by
40 said grant the absolute fee simple to the land thus granted; and as to whether said land so granted by the said Don Estevan Miro, as governor, to the said Don Juan Filhiol consisted of a certain one square league of land with the hot springs at the city of Hot Springs in the county of Garland and State of Arkansas aforesaid as the center of said league; and as to whether such pretended grant of land conveyed to said Don Juan Filhiol is definite and certain and applicable to the land described so as to identify the same; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that the pretended grant as set forth in said complaint in the Spanish language, together with a translation thereof in the English language, is a true and genuine grant of the land therein described, or that the said pretended grant is a lawful conveyance of any kind from Don Estevan Miro to Don Juan Filhiol.

And this defendant further denies that by said pretended grant the said Don Juan Filhiol was duly and fully vested with an absolute title to the tract of land one league square described therein.

And this defendant further denies that on the 6th day of December, 1788, or at any other time, one Carlos Trudeau, as a royal special surveyor of the province of Louisiana, made, executed and delivered a certificate of survey of said pretended grant of land to said Don Juan Filhiol, as set forth in said complaint in the
41 Spanish language together with a translation thereof in the English language.

And this defendant further denies that by the making and delivering of such certificate by the said Trudeau, judicial possession of said land was delivered and that the same had the force and effect of segregating said tract from the public domain and to vest a full and complete title thereto in said grantee.

And this defendant further says that as to whether any survey, figurative plan or procès verbal made by the said Trudeau as surveyor general have become lost or destroyed, he has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, says that as to whether in the year 1799, or at any other time, one Morales was governor of the said province of Louisiana by appointment of the King of Spain, or otherwise; and as to whether on said day in the exercise of the royal authority, or otherwise, he made and promulgated a regulation of law to govern the future conveyances of land in the said province by the subjects of the King of Spain, a pretended copy of

which is set forth in said complaint, or any other regulation of law on the subject, he has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

Defendant further says that as to whether the said Don Juan Filhiol did sell or convey said league of land described in
42 said complaint to his son-in-law Narcisso Bourgeat on the 25th day of November, 1803, or at any other time; and as to whether said deed from said Don Juan Filhiol to said Bourgeat was passed before Don Vinciente Fernandez Texiero as lieutenant of the regiment of infantry and military and civil commandant of the district of Ouachita; and as to whether said deed was witnessed by Senior Baron d'Bastrop and Don Jose Pomet; and as to whether said witnesses signed the act in the presence of Don Allex Breard, Don Carlos Bettien or Don Francisco Cavet, the said pretended deed being set forth in said complaint in an English translation; and as to whether said deed was thereafter reported in the proper office of the province of Louisiana in accordance with law, or otherwise, and was afterwards duly recorded in said office; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether the said Narcisso Bourgeat ever retroceded the same land so alleged in said complaint as being sold to him by the said Don Juan Filhiol to the said Don Juan Filhiol by deed passed before J. Poydras as judge of the court of the parish of Pointe Coupee on the 17th of July, 1806, or at any other time; and as to whether said Don Juan Filhiol ever thereafter parted with his title to said land; and as to whether the said pretended deed from *from* the said Narcisso Bourgeat to the said Don Juan Filhiol was filed for record or recorded in the office of the recorder of the parish of Pointe Coupee in the State of Louisiana on the 17th day of July, 1806, or at
43 any other time, said pretended deed being set forth in said complaint in an English translation; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether at the time said Filhiol executed said pretended deed to said Bourgeat, he, according to the requirements of the Spanish law, or otherwise, produced before Vinciente Fernandez Texiero, or then and there delivered to said Bourgeat, all his title papers, including the certificate of survey, figurative plan, procès verbal, grant, etc., and as to whether the same had been found to be valid; and as to whether when said retrocession was made all the title papers were produced before the officer by whom the pretended deed was witnessed and were actually delivered to the said Filhiol; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether the said Don Juan Filhiol after the alleged retrocession to him of said square league of land and after the Indian right of occupancy had been extinguished in 1818, made efforts to render the same available to the use to which it was by nature adapted; and as to whether in the year 1819 he effected the lease in

writing of the hot springs thereon to one Stephen P. Wilson for a period of five years, or any other period, with a view to the improvement of the same and the opening of such medicinal waters to public use, or any other purpose; and as to whether the said lessee,
44 Dr. Wilson, entered into possession under said lease in the year 1819 or made improvements or continued for some period in such occupation for the purpose of attracting thither those who might to desire to use such waters for healing; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether in the year 1821, or at any other time, said Don Juan Filhiol died; and as to whether further efforts to render said springs available were for many years impracticable, this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that since the death of the said ancestor said plaintiffs have always alleged their title to said property and employed agents and attorneys to do so for them.

That as to whether said plaintiffs have during nearly all of this interval been embarrassed by the want of the said pretended original grant to said land; and as to whether the same had been without the knowledge of the said heirs of the said Filhiol in the hands of one Resin P. Bowie, a lawyer who made a specialty of Spanish grants; and as to whether said Bowie died in 1843; and as to whether the said plaintiffs made repeated searches for said grant, failing to find it; and as to whether in 1883, or at any other time, said original pretended grant from said Don Estevan Miro to the said Don Juan Filhiol was found by Mrs. Matilda E. Moore of New
45 Orleans parish, Louisiana, among the effects of her mother, or elsewhere, and as to whether said grant was delivered by said Matilda E. Moore to Margaret A. Muse, a daughter of Narcisso Bourgeat, and Marie Barhe Filhiol, a granddaughter of Don Juan Filhiol, in the year 1883, or at any other time; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that the said Don Juan Filhiol at the time of his pretended death, or at any other time, by virtue of the said several grants and instruments of writing, or otherwise, had ever become the owner, or at the time of his pretended death was the owner, or in possession, of a league of land, being a tract about three miles square embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas, said parcel of land being more particularly described in said complaint.

That as to whether said plaintiffs duly applied to the Secretary of the Interior for a copy of the official description of said lot or tract as set out in the records and files of the Interior Department; and as to whether said application was refused, this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that the provision

of the third article of the treaty between the United States and the Republic of France, signed on the 21st day of October, 1803, and referred to in the said complaint, extended to the property of
46 the said Don Juan Filhiol or the rights of the said plaintiffs as his heirs in and to the same, or that it qualified the rights of property acquired by the United States thereunder.

And this defendant, further answering, admits that the United States has heretofore asserted title to the said land described in said complaint by virtue of the general cession of the province of Louisiana, and did, prior to the commencement of this suit, deliver over possession of the land in question to this defendant and establish him in such possession; but denies that the said possession is either wrongful or unjust.

And this defendant, further answering, denies that the said plaintiffs, or any of them, are by inheritance from their said ancestor lawfully possessed of the land in controversy, and denies that the United States has ever deprived them of their said property.

And this defendant, further answering, herein files exceptions to the said pretended grant in controversy by Estevan Miro to Don Juan Filhiol, and for ground of exception states, that the said pretended grant is not a true and genuine document but is a false, fabricated and counterfeited instrument, and at the date of the said pretended instrument said Estevan Miro had no authority of law to make and execute such grant and never did in fact sign his name to said instrument.

That said grant does not purport to be official or to come from any official depository; that the said grant, in as much as it fails to set forth the description of the land therein conveyed with
47 legal and sufficient distinctness, is void for uncertainty; and this defendant herein files exceptions to the pretended certificate of survey set forth in said complaint, and for ground of exception alleges: that the said document does not purport to come from any official custody or to be an official paper; that the said pretended certificate is false and fabricated and that the said Carlos Trudeau had no authority of law at the date of said pretended certificate to make the same, and never did in point of fact make such certificate; that said pretended certificate shows no such survey as is required by law, in as much as it sets forth no actual survey made upon the ground by metes and bounds, together with field notes and plat, or that such actual survey was duly certified, approved and recorded in the proper office; that the said pretended certificate does not show that the pretended grantee was ever placed in actual, pedal possession of the land described.

And this defendant, further answering, herein files exceptions to the pretended conveyance from Don Juan Filhiol to Narcisso Bourgeat, described in said complaint, and for ground of exception avers: that the said pretended document is not a true and genuine one, but is falsely fabricated and never was in point of fact executed by the said Don Juan Filhiol in the presence of the alleged witnesses, or otherwise; that the description of the land in the said pretended deed

differs essentially from the description of the land conveyed in the said pretended grant.

And this defendant further answering herein files exceptions to the pretended deed from Narcisso Bourgeat to Don Juan Filhiol, described in the said complaint, and for ground of exception alleges: that the said pretended conveyance is false and forged and that the description of the land contained in said deed differs essentially from that described in said pretended grant.

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And this defendant, further answering, avers that the said papers and documents set forth in said complaint set forth no right or title, legal or equitable, in the said plaintiffs, or any of them, to the land and property claimed by them in said complaint, and if genuine the said papers would clothe the said plaintiffs with a mere naked authority or permission.

And this defendant, further answering, alleges that the right and title of the said plaintiffs to the land in controversy herein utterly fails for the reason that the said pretended grant is void for uncertainty in description, and for the further reason that the complaint fails to set forth any actual survey by metes and bounds of the land and property in question, and for the further reason that said complaint fails to show that the plaintiffs, or their predecessors in title, or either of them, were ever put in actual, pedal possession of the land in controversy.

And this defendant denies that the alleged cause of action of the said plaintiffs against said defendant arises out of the said treaty or draws in question the construction thereof.

And this defendant further denies that the alleged cause of action of the said plaintiffs arises under the Constitution of the United States or involves the application thereof for the protection of their just rights.

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Second. And this defendant, further answering, says that the said plaintiffs cannot maintain their said claim, for the reason that said claim was barred by the act of Congress, approved May 26th, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims;" (4th Statute- at Large, 52 chapter, 173); and the acts amendatory thereof, including the act of June 17th, 1844 (5th Statutes, 676); the said plaintiffs not having complied with the said acts in instituting proceedings within the period required thereby.

Third. And this defendant, further answering, says that the said plaintiffs cannot maintain their said claim, for the further reason that the said claim is barred by the act of Congress, known as the "Hot Springs act," of June 11th, 1875, (16th Statutes at Large, 149 chapter, 126), in as much as the said plaintiffs have failed to institute proceedings within the period and as required by said act.

Fourth. And this defendant, further answering, says that the issues involved in this case are in this court *re- adjudicata*, for the reason that prior to the commencement of this action an action was brought in this court by Margaret A. Muse, *et al.*, *vs.* The Arlington Hotel

Company, involving the title and possession to a parcel of the
50 same land described in and covered by the pretended grant and conveyance set up in this cause, in which cause it became material and necessary to inquire whether said grant and conveyance to said Don Juan Filhiol was legal and valid, which said issue was by this court therein decided adversely to said claim, this court therein deciding that said grant and conveyance was ineffectual to pass title to said lands, or any of them, to said Filhiol, or either of said plaintiffs, and was null and void.

Fifth. And this defendant, further answering, says that the issues involved in this cause are in this court *re-adjudicata*, for the further reason that prior to the commencement of this action an action was brought in this court by Hippolite Filhiol, *et al.*, *vs.* Charles A. Maurice, *et al.*, involving title and possession to a portion of the same lands described in and covered by the pretended grant and conveyance set up in this cause, in which cause it became material and necessary to inquire whether said grant and conveyance to said Don Juan Filhiol was legal and valid, which said issue was by this court therein decided adversely to said claim, this court therein deciding that said grant and conveyance was ineffectual to pass title to said lands, or any of them, to said Filhiol, or either of said plaintiffs, and was null and void.

Sixth. And this defendant, further answering, alleges that the United States of America, whose officer and agent he is, has now been in possession of the property in question under a claim
51 of title and in good faith and believing itself the absolute owner thereof in fee simple for a long period, and while so holding said property in good faith has made valuable improvements thereon, to-wit: to the amount of one hundred thousand dollars ($100,000.00), said improvements consisting of substantial buildings and betterments.

Seventh. And this defendant, further answering, says that this action can in nowise be maintained or prosecuted by the said plaintiffs, or any of them, for the reason that their right of entry upon said land in controversy, if it ever existed, accrued more than seven (7) years before the commencement of this suit, and that this defendant, and his predecessors in title to the lands in controversy, have been in possession of the said premises ever since about the year 1810, and that ever since the extinguishment of the Indian title to said land on August 24th, 1818, said possession has been actual, exclusive, adverse and continuous; and that on or before the year 1883 the United States of America, whose officer and agent this defendant is, he being a major in the Army of the United States and commandant of the Army and Navy general hospital established and maintained by the United States upon the land in controversy, has been in actual, exclusive, open, notorious, hostile and continuous possession of said land, having said premises and all of them wholly inclosed during the whole of said period and having constructed thereon a massive structure designed and used as a hospital for the Army and Navy of the United States.

52 Eighth. And this defendant, further answering, alleges that said plaintiffs having failed for one hundred and fourteen (114) years to enforce their pretended claims, as set forth in the said complaint, are guilty of legal and inexcusable laches and have legally abandoned their said claims.

Ninth. And this defendant, further answering, says that the said United States having made valuable and expensive improvements upon said premises, as hereinbefore set forth, under claim of title to the said land in controversy and having exercised acts of ownership over the same, and the said plaintiffs having stood by while said improvements were being made and said acts of ownership were being exercised, making no protest and impliedly consenting thereto, are estopped from now claiming title to the premises in question.

Tenth. And this defendant, further answering, alleges that this court has no jurisdiction over this action, for the reason that the said complaint does not set forth facts sufficient to constitute a cause of action, in that the jurisdiction of this court is invoked wholly on the ground that the construction or application of the Constitution of the United States or the construction or validity of the said treaty is involved; whereas, in truth and in fact, neither of said instruments is in any way involved herein: and for the further reason that this suit is in substance and effect a suit brought by the plaintiffs against the United States of America, which is a sovereign nation.

53 And this defendant, further answering, says that by the treaty of session entered into April 30th, 1803, and ratified October 21st, 1803, between the Republic of France and the United States of America, known as the Louisiana Purchase treaty, the Republic of France, being at the date of said treaty the absolute owner of the premises here in controversy, conveyed the same to the United States of America, and that the latter has ever since been the sole and absolute owner in fee simple of said property and has for more than thirty (30) years now last past been in sole and actual possession thereof and is now the owner and in possession of the same; and that, therefore, this action being brought against a military officer of the United States and being in legal effect a suit against the United States, this court has no jurisdiction to hear and determine the same.

Wherefore, this defendant prays judgment, that this action may be dismissed at the cost of the plaintiffs, and that in case the plaintiffs should recover a judgment herein for the property in question the United States may have judgment for the value of its betterments thereon, as hereinbefore set forth.

WM. G. WHIPPLE,
United States Attorney.

54 "EXHIBIT 'A.'"

J. M. B. DEPARTMENT OF JUSTICE, J. C. M.
WASHINGTON, D. C., *August* 29, 1902.

William G. Whipple, Esq., United States attorney, Little Rock, Ark.

SIR: I transmit herewith copy of a letter from the acting Secretary of War, together with its enclosures, with reference to a complaint filed in your district against an officer of the United States Army in his official capacity, and affecting the interests of the Government.

You are instructed to appear for the defendant, and defend the interests of the United States.

You will report your action in the matter to this department.

Respectfully,

(Signed) H. M. HOYT,
Acting Attorney General.

Endorsed: Filed December 31, 1902. W. P. Feild, clerk.

55 And on January 2nd, 1903 the following proceedings were had to-wit:

HIPPOLITE FILHIOL ET AL.
vs. } 5224.
GEORGE H. TORNEY.

Comes the defendant George H. Torney by William G. Whipple Esq., United States attorney and by leave of court files herein his amended and substituted demurrer to complaint.

Which amended and substituted demurrer is as follows:—

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL
vs. }
GEORGE H. TORNEY.

Now comes the defendant George H. Torney by William G. Whipple Esq., United States attorney, duly authorized to appear herein for said defendant by the Attorney General of the United States, by letters of instructions, dated August 29th, 1902, a copy of which letter is annexed to the answer to the complaint of the said defendant heretofore filed herein; and files his amended and substituted demurrer to the said complaint, and for cause of demurrer states:

That it appears upon the face of said complaint:—

First. That the court has no jurisdiction over the person of the defendant;

Second. That the court has no jurisdiction over the subject matter of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

(Signed) WILLIAM G. WHIPPLE,
United States Attorney.

56 And on January 5th, 1903 the following proceedings were had to-wit:—

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY. } 5224.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys and comes the defendant by William G. Whipple Esq., United States attorney and defendant's demurrer to complaint hereto-fore set down for hearing on this date coming on for hearing and the parties not being ready for said hearing the same is continued until January 10th next.

And on January 10th, 1903, the following proceedings were had to wit:—

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY. } 5224.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys, and comes the defendant by William G. Whipple Esq., United States attorney and the demurrer and amended and substituted demurrer to complaint now coming on for hearing *and* the same *was* argued by counsel, and the court not being now well and sufficiently advised as to what judgment to render therein takes the same under advisement.

And on January 12th, 1903 the following proceedings were had to-wit:

HIPPOLITE FILHIOL
vs.
GEORGE H. TORNEY. } 5224.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys and comes the defendant by William G. Whipple Esq.,
57 United States attorney and the court being now well and sufficiently advised of the matters arising on the demurrer and the substituted demurrer, argued and submitted at a previous day of this term, considers that the same be sustained:

It is therefore considered, ordered and adjudged that said demurrer to the jurisdiction of this court be and the same is hereby sustained and that the complaint of plaintiff be dismissed.

The following opinion of the court was delivered on said demurrer:

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

This is the third action of ejectment brought by the plaintiffs in this cause to recover the premises in Hot Springs Arkansas, known as the Government reservation, including the hot springs and the Army and Navy Hospital of the United States. The demurrers to the complaints in both of the former actions were sustained by the court. In the first case, Muse *vs.* Arlington Hotel Company, 68 Fed. 637, the demurrer was to the merits of the case, but when removed to the Supreme Court by writ of error, the cause was there dismissed for want of jurisdiction of that court, because there was no Federal question involved. Muse *vs.* Arlington Hotel Company, 168 U. S. 430. The second action was by the Supreme Court reversed with directions to this court to dismiss it for want of jurisdiction. Filhiol *vs.* Maurice, 185 U. S. 108. And thereupon this action was instituted.

The complaint does not allege that there is a diversity of citizenship between the plaintiffs and the defendant, but relies for jurisdiction on the fact that the plaintiffs' rights arise under the
58 treaty with France for the purchase of the Louisiana territory and under the fifth amendment of the Constitution of the United States. The property involved in this action includes the Army and Navy Hospital of the United States, of which the defendants is in charge under the direction of the Government. The defendant demurs to the jurisdiction of the court.

Dan W. Jones and W. S. McCain for plaintiffs;
William G. Whipple, U. S. attorney for defendant.

TRIEBER, *District Judge:*

The allegations of the complaint as to the rights of plaintiffs under the tr-aty with France are practically the same as were those in the former cases and which the Supreme Court held were insufficient to confer jurisdiction on a national court, and in the last case directed a dismissal of the cause for want of jurisdiction. Filhiol *vs.* Maurice 185 U. S. 108. There can, therefore, be no jurisdiction on that gruond.

Does the complaint show that the cause arose under the fifth amendment to the Constitution prohibiting the exercise of Federal power to deprive any person of property without due process of law or to take private property for the public use without just compensation?

The complaint is an ordinary action of ejectment for the recovery of real estate in the State of Arkansas. The statutes of that State regualting the proceedings in ejectment are as follows:

"SECTION 2578. In all actions for the recovery of land, except

in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deed- and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff."

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"SECTION 2579. The defendant in his answer shall set forth exceptions to any of said documentary evidence, relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiff shall in like manner, within three days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the court, and shall be sustained or overruled, as the law may require; and if any exception is sustained to any such evidence the same shall not be used on the trial, unless the defect for which the exception is taken shall be covered by amendment."

"SECTION 2580. All objections to such evidence not specifically pointed out in the manner provided above shall be waived."

"SECTION 2581. To entitle the plaintiff to recover, it shall be sufficient for him to show that at the time of the commencement of the action, the defendant was in the possession of the premises claimed, and that the plaintiff had title thereto, or had the right to the possession thereof."

Had the plaintiffs followed this statute, merely setting up their evidence of title, the complaint would not show any jurisdiction; but in order to make such a showing they add that defendant is in possession by direction of the Government, thus adding to the complaint something not required by the statute, but which might have been set up for a defense by defendant's answer. Plaintiffs' rights depend solely upon the strength of *his* own title, the grant from the Spanish crown, and the only object in setting up defendant's right or claim or right to possession is to inject a Federal question into the case by intimating that the defendant will interpose as a defense an act violative of the national Constitution. The jurisdiction of a national court cannot be invoked by anticipating a defense. In City of Fergus Falls *vs.* Fergus Falls Water Co., 19 C. C. A. 212; 72 Fed. 873, this was attempted but the court held it could not be done. Judge Caldwell, in delivering the opinion of the court said:

60

"In equity pleadings the complainant is allowed to anticipate and avoid a defense, and this is called 'the charging part of the bill.' But at law the plaintiff is never expected to state matters which should come more properly from the other side. It is sufficient for each party to make out his own case. It is sufficient for the plaintiff to state his own cause of action and he should not

anticipate his adversary's defense for the reason that the latter may never make the defense sought to be guarded against."

And it is equally well settled that the suggestion in a complaint in an action at law that the defendant may or will set up a defense based on a State statute repugnant to the constitution does not make the suit one arising under the constitution.

The averments of the complaint, beyond those which state a cause of action, are mere surplusage. When the statement of the plaintiff's cause of action, in legal or logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the Constitution or laws of the United States, then the suit is not one arising under that Constitution or those laws, and the circuit court has no jurisdiction."

In Tennessee *vs.* Union and Planters Bank, 152 U. S. 454, it was sought to invoke the jurisdiction of the national courts by a sug--estion in the bill "that the defendants will contend that the laws of the State under which the plaintiff claims is void, because in contravention of the Constitution of the United States," but it was held that:

"By the settled law of this court, as appears from the de-
61 cisions above cited, the suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under the Constitution or those laws."

To the same effect see Chappell *vs.* Waterworth, 155 U. S., 102; Walker *vs.* Collins, 167 U. S. 57; Sawyer *vs.* Kochersperger, 170 U. S. 303; Florida etc. Ry. Co. *vs.* Bell 176 U. S. 321; Arkansas *vs.* Kansas etc. Coal Co. 183 U. S. 185; Montana Ore Company *vs.* Boston Mining Company, 35 C. C. A. 1, 5; 93 Fed. 274, 279.

Treating the allegations anticipating the defendant's defense as surplusage, there is clearly no Federal question involved, and the court is without jurisdiction.

Endorsed: Filed January 12th, 1903 W. P. Feild clerk.

62 And on March 14th, 1902 the following proceedings were had to-wit:—

HIPPOLITE FILHIOL ET AL.
vs. } 5224.
GEORGE H. TORNEY.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys and by leave of court file herein their assignment of errors and petition for writ of error; and said plaintiffs having executed a bond in due form of law which is approved by the court and the same being considered it is ordered that a writ of error issue herein to remove this cause to the Supreme Court of the United States and that a citation issue to said defendant George H. Torney.

And come said plaintiffs by their said attorneys and file herein their writ of error and citation which are duly allowed and signed by the court and service of the same duly accepted by the said defendant.

Which assignment of errors is as follows.

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

And now comes Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse by their mother and next friend; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, Lizzie S. Cochran, and Robert R. Sanford,
63 Mary A. Bres, Ellen M. Parker, George B. Muse, and Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse and James Fort Muse, Mary E. Behen, Alice F. South, Victoria A. Horton Bartholomew, Frederick Horton and Joseph E. J. Muse, by their counsel W. S. and F. L. McCain and respectfully represent that they feel themselves aggrieved by the judgem-nt of the circuit court of the United States for the western division of the eastern district of Arkansas, and by the rulings and decisions of said court in the said action leading to such judgem-nt, and respectfully assign error in the said judgment as follows:

1. The said circuit court erred in rendering the said judgem-nt upon the record.

2. The said circuit court erred in sustaining the demurrer to the complaint in said action, and in not overruling the same.

3. The said circuit court erred in holding that such court was without jurisdiction to hear, try and determine said action.

4. The said court erred in holding that the allegations in the complaint were or are insufficient to confer jurisdiction as of an action arising under the treaty with France set up in said complaint.

5. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to show a cause of action arising to the plaintiffs against the defendant by virtue of the third article of the said treaty with France.

6. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to confer jurisdiction as of an action arising under the Constitution of the United States as set up in the said complaint.

7. The said court erred in holding that the allegations of the com-

plaint in said action were or are insufficient to show a cause
64 of action in favor of the plaintiffs and against the defendants arising to the plaintiffs by virtue of the Constitution of the United States in the provisions of the fifth amendment thereof.

8. The said court erred in holding that the plaintiffs were not entitled to recover the premises described in the complaint according to the allegations thereof and the prayer for a judgment therein contained.

9. The court erred in divers other matters manifest upon the face of the record of said action.

Wherefore the plaintiffs in error pray this honorable court to examine and correct the errors assigned and for the reversal of the judgem-nt of the circuit court of the United States for the western division of the eastern district of Arkansas in the above entitled cause.

(Signed) W. S. AND F. L. McCAIN,
Attorneys for Plaintiffs.

Endorsed: Filed March 14th, 1903, W. P. Feild, clerk.

Which petition for writ of error is as follows:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

The petitioners Hippolite Filhiol, Francis J. Watts, Harriet
65 L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, Eugene Muse and Cecil Muse, Frank C. Bres, Ferdinand A. Fenner, Blanch- F. Power, Robert W. Fenner, Margaret A. H. Campbell, Lizzie S. Cochran, Robert R. Sanford, Mary A. Bres, Ellen M. Parker, George B. Muse, Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse, James F. Muse, Mary E. Behen, Alice F. South, Victoria A. H. Bartholomew, Frederick Horton and Joseph E. J. Muse the above named plaintiffs being aggrieved by the judgem-nt made and entered in the above entitled cause on the 12th day of January 1903 and the several rulings of the court herein file herewith their assignment of errors in said cause and pray a writ of error to the end that the rulings and judgem-nt of the court in said cause may be reversed by the Supreme Court of the United States.

(Signed) W. S. AND F. L. McCAIN,
Att'ys for Plaintiffs.

Writ of error allowed returnable within thirty days upon execution of bond for five hundred dollars ($500).

(Signed) JACOB TRIEBER,
U. S. District Judge.

Endorsed: Filed March 14th, 1903, W. P. Feild, clerk.

66 Which bond for appeal is as follows:

Know all men by these presents that we, Hippolite Filhiol, *et als.*, as principals and S. L. Crissey and James L. Pugh, Jr., as sureties, are held and firmly bound unto George H. Torney in the full and just sum of five hundred dollars to be paid to the said George H. Torney, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by th-ses presents.

Sealed with our seals and dated this 5th day of March in the year of our Lord one thousand nine hundred and three.

Whereas lately at a circuit court of the United States for the eastern district of Arkansas in a suit pending in said court between Hippolite Filhiol *et als.* plaintiffs and George H. Torney defendant a judgment was rendered against the plaintiffs and the said plaintiffs have obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the plaintiffs shall prosecute said writ to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

SARDIS L. CRISSEY. [SEAL.]
JAMES L. PUGH, JR. [SEAL.]

Sealed and delivered in presence of—
A. H. WYMAN.
JOSEPH HARPER.

67 Subscribed and sworn to before me this 5th day of March A. D. 1903.

[SEAL.] (Signed) JOSEPH HARPER,
Notary Public.

Approved:
JACOB TRIEBER,
U. S. District Judge.

Endorsed: Filed March 14th, 1903 W. P. Feild, clerk.

68 UNITED STATES OF AMERICA, *ss:*

To George H. Torney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of United States for western division of eastern district of Arkansas wherein Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bress, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by their mother and next friend; all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, all residents of the State of Texas, Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford, residents of the State of Mississippi, Mary A. Bres, resident of the State of Illinois, Ellen M. Parker, resident of the State of California, George B. Muse, and Mary L. Muse, resident- of the State of Minnesota, Malvina R. Muse Bowman, resident of the State of Wisconsin, Bessie Muse resident of the State of Iowa, James Fort Muse resident of the State of Oregon, Mary E. Behen, resident of the State of Missouri, Alice F. South, resident of Mexico, and Victoria A. Horton Bartholomew, now Mrs. J. D. A. Harris, resident of the State of Washington, Frederick Horton and Joseph E. J. Muse residence unknown plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Jacob Trieber judge of the circuit court of the United States, east. dist. Arkansas this 14th day of March, in the year of our Lord one thousand nine hundred and three.

JACOB TRIEBER,
U. S. District Judge, East. Dist. of Ark.

M'CH 14, 1903.

Service of this citation accepted.

WM. G. WHIPPLE,
Att'y for Def't.

Endorsed: Filed M'ch 14, 1903 W. P. Feild, clerk.

69 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

I, W. P. Feild, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office, of the assignment of errors and of all proceedings in case of Hippolite Filhiol *et al.*, *vs.* George H. Torney.

In witness whereof, I have hereunto set my hand and the seal of said court, this 25th day of March in the year of our Lord, one thousand nine hundred and three and of the Independence of the United States of America, the one hundred and twenty-seventh.

{ The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A. }

Attest: W. P. FEILD, *Clerk.*

Record $24.50.

Endorsed on cover: File No. 18,884. E. Arkansas C. C. U. S. Term No. 252. Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, *et al.*, plaintiffs in error, *vs.* George H. Torney. Filed April 6th, 1903.

either on the merits. The appellee in the present case, who was the defendant below, is the agent of the United States in possession and control of the premises in question, which consist of a tract or lot, and a hospital thereon, established and maintained by the Government, on the so-called Hot Springs Reservation in the State of Arkansas.

I am authorized to say that the Government concurs in this motion.

J. H. McGOWAN,
Attorney for Appellants.

WM. F. VILAS,
BRANCH K. MILLER,
Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 252.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS IN ERROR,

vs.

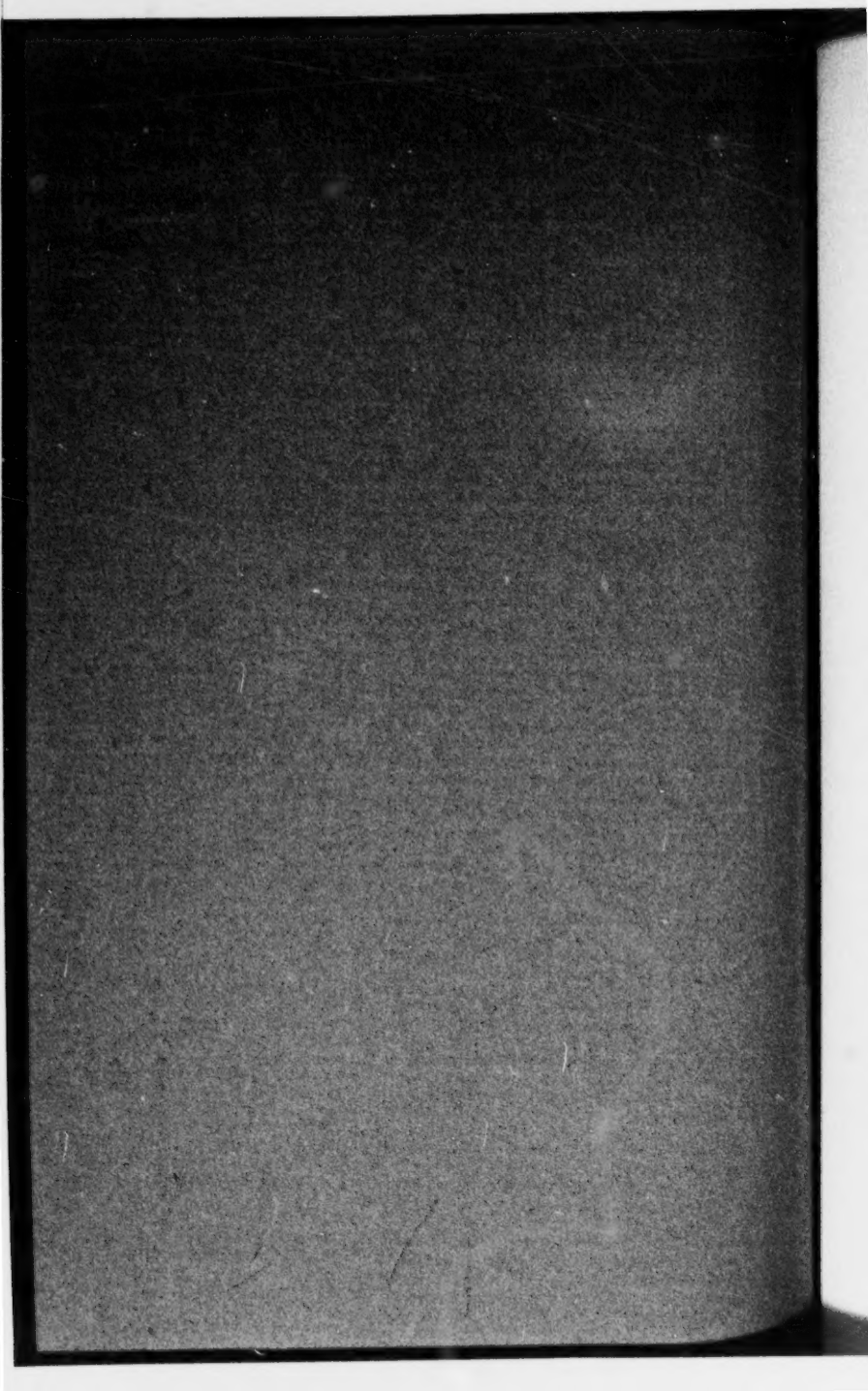
GEORGE H. TORNEY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

BRANCH K. MILLER,
Attorney for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 16417

(17,734.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 252.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE H. TORNEY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This suit was brought by the plaintiffs, as the heirs and descendants of Don Juan Filhiol, for the possession of a certain tract of land in Garland county, Arkansas, embracing all the hot springs in the city of Hot Springs, in that State.

The source of plaintiffs' title was a grant by Don Estevan Miro, governor of the then Spanish colony of Louisiana, made February 22, 1788. The complaint sets out that on December 12, 1787, Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land of which the governor thereupon ordered a survey to be made by Don Carlos Trudeau, the then surveyor general

of the province, which survey was made in execution of this order prior to February 22, 1788, the date of the grant; that Trudeau made a report of his survey, with a figurative plan and procès verbal thereof, in due form, in which the land was described as follows:

"A tract of land, with a front of eighty-four arpents, and a depth of forty-two arpents, on each side of the stream, called La Source d'Chaude, about two leagues distant from its entrance into the Ouchita, having the Hot Springs for its center, its limits extending in parallel lines, east and west, to its full depth, and bounded on both sides by land belonging to the Crown."

The complaint further sets up that the survey, figurative plan, and procès verbal had been lost or destroyed and could not be produced by plaintiffs, but that on February 22, 1788, Miro, the governor of the province, made and delivered to Filhiol a grant for a certain league of land, which said grant was in words and figures as follows, to wit:

" *The governor and intendant of the province of Louisiana and West Florida and inspector of troops, etc.:*

" Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession which he has given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land of one league square, situated in the district of Arkansas on the north side of the River Ouchita, at about two leagues and a half distant from the said River Ouchita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of the said Surveyor Trudeau above named, and recognizing the same in conformity to the order of survey, we approve those surveys using the faculty which the king has vested in us, and we grant in his royal name, unto the said Juan Filhiol the said league of land in order that he may dispose of the same, and the usufruct thereof as his own.

" We give these presents under our own hand, sealed with the seal of our own arms, and attested by the undersigned

secretary of His Majesty in this government and intendance.

"In New Orleans on the 22d day of February, 1788.

"(Signed) [L. S.] ESTEVAN MIRO.

"By mandate of His Excellency.

"(Signed) ANDES LOPEZ ARMISTO.

"Registered."

Plaintiffs further allege that this grant was made to their ancestor while he was acting as commandant of the post of Ouchita as a reward for his civil and military services in that character; that Miro, in his capacity as governor general, was by the Spanish colonial laws then in force vested with authority to make grants of land, and to convey by said grants the absolute fee-simples to the land thus granted; that after the making and delivery of the said grant by Miro to Filhiol, on December 6, 1788, Carlos Trudeau, the surveyor general of the province, executed and delivered a certificate of measurements of the land thus granted to Filhiol; which certificate, translated into English, was in the following terms:

"Don Carlos Trudeau, land and particular surveyor, of the province of Louisiana, in consequence of a memorial signed on the 12th day of December, in the year 1787, by Don Juan Filhiol, commandant of the post of Ouchita, and by order of His Excellency Don Estevan Miro, brigadier of R. ex-gob., intendant of the province of Louisiana, West Florida etc., dated the 22nd of February 1788, directing me to give possession to the aforesaid commandant, of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouchita river, in the district of Arkansas, at about two leagues and a half distant from said river, to be verified by the figurative plan, which

accompanies in conformity with —— of the 6th of the present month of December and of the current year 1788.

"(Signed) CARLOS TRUDEAU."

That the making and delivery of this certificate was a delivery of the judicial possession of the land and had the force and effect of segregating the same from the public domain, and, along with the grant already set out, vested full and complete title thereto in the grantee.

The complaint further shows that Filhiol, on November 25, 1803, by a deed or act of sale passed before Don Vincente Fernandez Texeir, sold and conveyed the land described in the grant of Governor Miro to his son-in-law, Narcisso Bourgeat, which deed was witnessed by the Baron de Bastrop, of Ouchita, and Don Jose Pomet, who signed the act in the presence of Don Alexandre Breard and Don Carlos Bettin, all of whom were principal men in Ouchita at the date thereof; that the said deed, when translated into the English language from the Spanish language, was in the terms following, to wit:

"Be it known, to all to whom this act may come, that I Don Juan Filhiol, captain in the army, commandant of the militia, of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law and resident of this district, a tract of land with a front of eighty-four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'eau Chaude,' about two leagues distance from its entrance into the Ouchita, having the hot spring for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown, the same, which belongs to me by virtue of a grant obtained from Senor Don Estevan Miro, then governor of these provinces, dated the 12th day of December 1777. I sell the same to the abovenamed Bourgeat with all its ways of entrance and exits, uses stated customs and servitude, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowledge the receipt, and to obviate the actual receipt

thereof at this moment, I renounce the exception of *numerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession use, dominion of seignory I may have had, or hold in and to the said tract of land, and do grant and renounce in favor of, and transfer to this purchaser all such title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor, in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction and to insure the reality and perfection of this sale, I hereby affect and obligate thereto all the property, I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular, and being present at the passing of this act, I, the above-named Narcisso Bourgeat, accept the same acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of Ouchita on the 25th day of the month of November one thousand eight hundred and three.

"I, Don Vincente Fernandez Texeir, lieutenant of the regiment of infantry of Louisiana and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Bettin and Don Francisco Cavet all of whom are residents of this district.

"The interlineation Cavet is part of this act and the erasure Bettin is not.

"(Signed) JUAN FILHIOL.
"(Signed) NARCISSO BOURGEAT.

"Done within my jurisdiction.
"(Signed) VINCENTE FERNANDEZ TEXEIR.

"BARON DE BASTROP.
"J'E POMET.

The complaint further avers that this deed was immediately thereafter "reported in proper office of the province of Louisiana in accordance with law," and there duly recorded.

It is then alleged that on July 17, 1806, by a deed passed before J. Poydras, the lands were retroceded by Bourgeat to Filhiol, which act of retrocession was recorded in the office of the recorder of the parish of Pointe Coupee, in the State of Louisiana, July 17, 1806; that this act or deed, translated from the French language, in which it was executed, into the English language, was as follows, to wit:

"I, the undersigned, Narcisso Bourgeat, retrocede by these presents to Monsieur Juan Filhiol, a piece of land three leagues front and one in depth, situated on the Bayou Darquelon, and one also of a league square, situated at the source of the hot water of the Ouchita, the which lands he sold to me by deed given before Don Vincente Fernandez Texeir, commandant at that time at said Ouchita, and which I return to him for the same price and sum which he had parted with to me, and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it, appertaining his right, in behalf of which I have signed at Pointe Coupee the seventeenth day of July, one thousand eight hundred and six.

"(Signed) NARCISSO BOURGEAT."

"I certify that the presented retrocession has been made in my presence the same day as that above.

"(Signed) J. POYDRAS,

"*Judge of the Court of Pointe Coupee.*"

Proceeding, the complaint further shows that at the time of the execution by Filhiol of the transfer or conveyance of the land by him to Bourgeat, in accordance with the requirements of the Spanish law, he actually produced before Texeir, lieutenant of infantry and military and civil commander of the district of Ouchita, all his title papers, including the certificate of survey, figurative plan, procès verbal, grant, etc., the same having been found to be valid,

and that all these papers were produced before the officer by whom and in whose presence was passed the subsequent act by which Bourgeat retroceded the property to Filhiol, and were then and there delivered to Filhiol.

The complaint sets out the further statement that Filhiol, plaintiffs' ancestor, in 1819 leased the said Hot Springs to one Dr. Stephen P. Wilson for five years; that shortly after thus leasing to Wilson, to wit, in the year 1821, Filhiol died; that since his death plaintiffs have always urged their title to the property and employed agents and attorneys to do so for them, but they have been during the greater part of this time embarrassed by not having possession of the said original grant, this having been in the hands of one Resin P. Bowie, a distinguished lawyer of the times, but that after his death, in 1843, after much diligent search, the said grant was found among his effects, or those of his widow, in 1883, by Mrs. Mathilda E. Moore, of the parish of Orleans, Louisiana, who was a daughter of the said Narcisso Bourgeat, and by Marie Barbe Filhiol, a granddaughter of Don Juan Filhiol.

The complaint closes with other allegations concerning the cause of action set up, which it is unnecessary to repeat here.

This complaint the defendant met in the lower court with a general demurrer, to the effect that the allegations of the complaint did not constitute a cause of action.

The circuit court having maintained the demurrer and dismissed the complaint, this writ of error was taken out by plaintiffs.

AS TO THE JURISDICTION.

This court has jurisdiction in the present case.

The petition or declaration of the plaintiffs sets forth (R., 11 and 12) that by the third article of the treaty between the United States and the Republic of France ratified on October 21, 1803, the inhabitants of the province of Louisiana

were protected in the free enjoyment of their property; that by effect of this treaty provision the inhabitants of the Territory of Louisiana were fully protected in all their rights, complete and perfect, choate or inchoate, and any act of any person claiming to proceed under the authority of the United States was in contravention of such treaty.

Morrison *vs.* Whetstone, 5 La. An. Rep., 636–638.
United States *vs.* Reynes, 9 H., 127–151.

The petition or declaration proceeds to say that a just construction of the treaty extended to the property of Filhiol, plaintiffs' ancestor, and also to the rights of plaintiffs, his heirs, but that, nevertheless, denying that the plaintiffs were entitled to be maintained and protected in their property by any construction of the treaty, the United States asserted title to the lands sued for by virtue of the general cession to it of the province of Louisiana, without regard to the exception contained in said treaty, under which plaintiffs claim.

That, by its officers or agents, the United States expelled the plaintiffs from the possession of the land, part and parcel of the grant of their ancestor, without making compensation therefor, and established the defendant, one of its officers, in such possession; that the defendant has remained in such possession as superintendent of the United States Army and Navy hospital, ousting the plaintiffs in denying their rights to the premises, by direction of the United States.

Plaintiffs alleging that their cause of action arises out of the treaty and draws in question its construction.

It is further declared that the United States has deprived them of their property without any process of law or any legal right to do so, and has made no compensation to plaintiffs for the public use of their property; that in consequence the cause of action arises under the Constitution of the United States and involves the application thereof for the protection of the just rights of plaintiffs.

Under these allegations this court has jurisdiction.

The question here is, first, whether or not the rights set up by plaintiffs were protected by the treaty between France and the United States of 1803; and, second, whether or not, under the Federal Constitution, they were entitled to compensation for the use of their property taken, as is set out, by the United States for public use.

In a case where the issue is whether certain acts amounted to a crime under a treaty this court has taken jurisdiction.

Tenlinden *vs.* Ames, 184 U. S., 270–282, *et seq.*

In Rice *vs.* Ames, 180 U. S., 371–374, this court took jurisdiction in a case involving the question whether or not the provisions of a treaty applied to an affidavit describing a supposed extradictable offense.

In Ornelas *vs.* Ruiz, 161 U. S., 502–507, it was held that in such a case the construction of the extradition treaty was involved, and the appeal was properly taken to this court.

In Florida *vs.* Furman, 180 U. S., 402–427–428, where the question was whether a certain alleged title under a Spanish grant was protected by treaty, that the appeal to this court could be maintained for the reason that it involved the construction of a treaty. (See pp. 427–428.)

In Filhiol *vs.* Maurice, 185 U. S., 108, *et seq.*, it was decided that the acts set up by the petition, or declaration, stated a case which arose under the Constitution or laws of the United States, and was one in which a writ of error was properly taken direct to the circuit court from this court.

185 U. S., 110.

The court, on the merits, however, decided that upon its examination of the case it was met with the question whether or not the jurisdiction of the circuit court could have been maintained irrespective of adverse citizenship, and the conclusion of the court was that such jurisdiction could not be maintained.

185 U. S., 111.

It was declared that it must appear from the plaintiffs' own statement that the case was one which arose under the Constitution or the treaties of the United States in order to confer such jurisdiction, and, the court being of the opinion that such was not the case, it was declared that the circuit court should have dismissed the suit.

It is respectfully submitted that the omissions found to be fatal in the cited case have been supplied in the case at bar.

This is found in the petition or declaration, which declares that although the plaintiffs were entitled to be maintained and be protected in the enjoyment of the property sued for under any construction of the treaty, that the United States asserted title by virtue of the said treaty without regard to the exception found in the third article thereof, and, also, that the United States had deprived plaintiffs of the property sued for without due process of law, and without any legal right had taken the same for public use without making any compensation therefor, and thus a cause of action arose under the Constitution and involved its application for the protection of plaintiffs' just rights.

These allegations would give the circuit court jurisdiction.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in rendering the said judgment upon the record.

2. The said circuit court erred in sustaining the demurrer to the complaint in said action and in not overruling the same.

3. The said circuit court erred in holding that such court was without jurisdiction to hear, try, and determine said action.

4. The said court erred in holding that the allegations in the complaint were or are insufficient to confer jurisdiction as of an action arising under the treaty with France, set up in said complaint.

5. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to show a cause of action arising to the plaintiffs against the defendant by virtue of the third article of the said treaty with France.

6. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to confer jurisdiction as of an action arising under the Constitution of the United States, as set up in the said complaint.

7. The said court erred in holding that the allegations of the complaint in said action were or are insufficient to show a cause of action in favor of the plaintiffs and against the

defendant, arising to the plaintiffs by virtue of the Constitution of the United States in the provisions of the fifth amendment thereof.

8. The said court erred in holding that the plaintiffs were not entitled to recover the premises described in the complaint according to the allegations thereof and the prayer for a judgment therein contained.

9. The court erred in divers other matters manifest upon the face of the record of said action.

ARGUMENT.

For the reversal of the judgment of the circuit court plaintiffs rely upon certain errors contained in the judgment of the court *a qua*, which were set out in the assignment of errors, on pages 17 and 18 of the record.

The first assignment is as follows:

"The court erred in holding that the grant made to Don Juan Filhiol and the figurative plan, procès verbal, and survey and certificate of the surveyor general set forth in the complaint of the plaintiffs in error, did not vest in the said Filhiol, a legal and equitable title to the land in controversy, which was guaranteed and protected by the provisions of the treaty between the United States and France, ratified on the twenty-first day of October, 1803."

The grant to Don Juan Filhiol was made by Governor Estevan Miro on February 22, 1788. (See Record, page 4.)

Miro, the Spanish governor of Louisiana, had power to grant lands within the province, which at the date of the grant in question included the territory now constituting the State of Arkansas. Such authority of Governor Miro has been affirmed by the supreme court of Louisiana, which has had frequent occasion to consider and adjudicate upon the character and effect of titles granted by the French and Spanish governors of Louisiana.

Murdock *vs.* Gurley, 5th Robinson (La.) Rep., page 457 *et seq.*

Choppin *vs.* Michel, 11 Robinson (La.) Rep., 240.

Davis *vs.* Police Jury, 19th La., 541.

Strother *vs.* Lucas, 12 Peters, 437, 438.

It has been held that the courts would take judicial notice without proof of the signatures of the French and Spanish governors and the higher officials of the colony; that if any doubt existed as to the authenticity and genuineness of such signatures or as to the authority of the officer, the burden of proving fraud or want of authority devolved on the party making the objections.

Choppin *vs.* Michel, 11th Robinson (La.) Rep., 240.

Smythe *vs.* N. O. C. & B. Co., 93 Federal Reporter, 914, 915.

Hays *vs.* Berwick, 2d Martin (La.) Rep. (old series), 138, 139.

Davis *vs.* Police Jury, 19 Louisiana Reports, 541.

Davis *vs.* Police Jury, 1st La. Annual Reports, 294, 295.

The certificate of Andres Lopez Armesto that the grant is "By mandate of His Excellency," following the signature of Governor Miro, must be given its full effect, which would include the verity of his official declaration that the grant

was made by the governor, as set out in the instrument which he countersigned.

That there had been a prior survey by Trudeau cannot be disputed, because the grant expressly declares that it was made. It begins with the declaration that the governor "having examined the proceedings (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession of which he has given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land," etc.

However, the inability of plaintiffs to produce the surveyor's plan and procès verbal of Trudeau, made prior to the grant, is compensated by the survey of Trudeau, made December 6, 1788, nearly one year after the grant itself, which was made February 22, 1788. The certificate of Trudeau that he had made such a survey and *delivered possession of the land* to the grantee expressly declares that he did so by order of Governor Miro, upon the petition of Filhiol, presented to him, the governor, December 12, 1787. The declaration of Trudeau is that he measured in favor of Filhiol the league of land indicated in the latter's memorial, situated "on the north side of the Ouchita river, in the district of Arkansas, about two leagues and a half distant from the said river," which he declares to be verified by the figurative plan which accompanies it. It will be noted that the description of the land found in Trudeau's certificate agrees with that which appears in Governor Miro's grant, both declaring, among other facts, that it is to be so measured as to include the spot known by the name of "Hot Waters," as expressed in the grant; "Warm Waters," as set forth in the certificate.

The grant of February 22, 1788, sufficiently shows *prima facie* a divestiture of the Spanish king's title to the land which it describes and a vesting of it in Filhiol, the grantee. It is in terms translative of property, since it declares that Governor Miro, "using the faculty" the king had

vested in him, in his royal name granted to Filhiol "the said league of land, in order that he may dispose of the same, and the usufruct thereof, as his own." If the description set out in the grant itself may be considered as not fully and completely identifying the land, such defect, if it exists, is supplied by its reference to the figurative plan and certificate of survey, previously made by Trudeau, the surveyor general of the province, which the governor recognizes as "in conformity to the order of survey" made prior to the grant. The governor says in the grant, "We approve those surveys." There are thus called in aid, if such be required, of the description found in the grant itself the exact measurements of the government surveyor, made in his official capacity, in conformity to the governor's order for the making of the same. That such survey was made is established by Miro's approval of it, it being a reasonable presumption that his approval would not have been given to a survey which had never been made; but, on the contrary, that the location, measurements, and plan of Trudeau were before him and were examined before their approval.

The opinion of the circuit court is not found in the record, in consequence of which there is nothing before this court to show the line of reasoning by which the court below reached a conclusion adverse to the plaintiffs. In the absence of any statement of the grounds upon which rested the judgment of the court below, we will assume that the grant was held invalid in the present case, upon the same grounds upon which a similar conclusion was reached by the same court in Muse *vs.* Arlington Hotel Company, 68 Federal Rep., 637, in which case the same grant was under examination.

The Filhiol grant in that case was held imperfect and incomplete by reason of a non-compliance with the twelfth section of the regulations of Alexandro O'Reilley, the first Spanish governor of Louisiana, promulgated February 18, 1770, which was as follows:

"All grants shall be made in the name of the king by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the procès verbal, which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor to be annexed to the title of his grant."

The demurrer to the complaint filed in the lower court should have been overruled, since at the most the case disclosed by the complaint could have only failed, if at all, for the want of sufficient proof on the trial of the merits. The complainants have averred every fact which appears on the face of the grant, or which may be reasonably and fairly inferred from what is therein particularly set forth. The grant affirms that there had been an order for a survey prior to its date; that such survey had been made in conformity with the order, and that it had been approved by the governor. Whether or not these facts are sufficiently established by the recitals of the grant is a question which pertains to the merits of the cause, but not the adequacy of the complaint as stating a cause of action.

The facts that a survey of the land had been made by Trudeau in compliance with the governor's order to that end, both prior and subsequent to the execution of the grant, and that at this survey he made a figurative plan and certificate, to which the approval of the governor had been given, are declared by the grant in positive terms. Upon the demurrer, these facts are not open to dispute or question.

If a prior survey, made pursuant to an order of Miro, was a necessary condition to the validity of the grant, the existence of these conditions was to be ascertained by Miro before the grant was made. The express declaration of the latter

that all of the steps had been taken may be accepted as evidence that they had been accomplished.

1st Greenleaf on Evidence, section 20, 144.

The circumstance, therefore, that plaintiffs do not file with their complaint the survey, figurative plan, and procès verbal of Trudeau, which are mentioned in it, in no respect diminishes the strength of case disclosed by the complaint. In any event, there is ample authority for the statement that everything set out in the grant as a fact, if it be necessary for its validity, is fully established by the recital of the grant itself. Besides other facts appearing upon the face of the grant, should be noted the language with which it begins, this declaring that Filhiol was already in possession of the grant ceded, such possession having been given him by Trudeau at a date anterior to the governor's grant. It may be presumed that the possession thus declared in Filhiol was the possession of the distinct, determinate body of land of which the governor designed to convey the king's title; that the possession given by Trudeau was of a tract of land which had been clearly defined by boundaries and measurements ascertained by himself in the discharge of his official duty.

The recitals and declarations of the grant in this connection, so far as they disclose facts, are original evidence thereof, being within one of the exceptions to the admissibility of hearsay evidence, as to ancient documents.

1st Greenleaf on Evidence, page 141, sections 141, 142, *et seq.*

Conceding, however, for the sake of argument, that we must look solely to the terms of the grant itself for a description of the property, sufficient in terms to identify it, unaided by the sources of information indicated by the references contained in it, and assuming also, for the moment, that its terms of description do not identify the land with

sufficient particularity, there is found in the record another muniment of title, which shows that it was located, ascertained, and delimited by competent authority. It appears by the certificate of Trudeau, the surveyor, that he measured the league of land indicated in the memorial, situated "on the north side of the Ouchita, in the district of Arkansas, at about two and one-half leagues distance from said river" (terms corresponding with those used by the grant in describing the land), which measurements are verified by a figurative plan, which accompanied his report or procès verbal of December 6, 1788.

See Record, pages 4 and 5.

The significance and effect of Trudeau's surveys have been well settled by decisions of the supreme court of Louisiana and of the Federal courts. They have been recognized and acted upon in the reports of land commissioners, acts of Congress confirming grants, by the land authorities of the United States, and by the officers of the Department of Interior.

United States *vs.* Hanson, 16 Peters, 200, 201.

United States *vs.* Boisdore, 11 Howard, 91, 92.

Smythe *vs.* New Orleans Canal & Banking Company, 93 Federal Reporter, 919, 920.

Decision of the Secretary of the Interior in New Orleans Canal & Banking Company *vs.* State of Louisiana, rendered January 18, 1884.

Decision of the Commissioner of the Land Office in the "Malines case," 2d Copp's Land Owner, page 21 *et seq.*, especially page 22.

In Litchworth *vs.* Bartels, 4th Martin (La.) Reports, New Series, 136, it was held that a plat or plan certified by Trudeau, surveyor general of the province, was legal evidence in support of title to the land surveyed.

It should be remembered that the survey, the certificate of which is found in the record, was not the one which was made prior to the grant, because it declares that it is made "by order of His Excellency, Don Estevan Miro, brigadier of the R. ex-gob., intendant of the province of Louisiana, West Florida, etc., dated February 22nd, 1788," which is the date of the grant itself. Affirmative evidence is afforded by the terms of this latter, and it was preceded by another survey made by Trudeau at an antecedent date, evidently for the purpose of ascertaining whether the land described in Filhiol's memorial was at the place where the latter declared it to be, and, if so, to locate it and fix the boundaries. The subsequent proceedings of Trudeau, described in his return or certificate of December 6, 1788, were posterior to the grant of Governor Miro.

The procès verbal of Trudeau declares that it is made in consequence of a memorial addressed by Filhiol to Governor Miro, December 12, 1787, and by an order of the latter to him, Trudeau, dated February 22, 1788, to give Filhiol possession of "a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters." The procès verbal further declares that in conformity with the order of the governor he, Trudeau, had measured in favor of Filhiol the league of land indicated in the memorial, situated on the north side of the Ouchita river, in the district of Arkansas, about two leagues and a half distance from the said river, to be verified by the figurative plan. This description of the land, actually measured by Trudeau, is in coincidence with that which is found in the grant of Governor Miro.

But no departure by Governor Miro from the procedure directed by the 12th section of O'Reilly's regulations could in any manner affect the validity of a grant made by Miro, or diminish its force and effect; the authority of O'Reilly, as governor of the province, did not exceed that of Miro, one of its subsequent governors; the powers of each were of

the greatest amplitude; each represented the King of Spain and had full power and authority to do in the province all that the sovereign could do.

United States *vs.* Arredondo, 6th Peters, 728, 729, 746, 747.
Murdock *vs.* Gurley, 5th Robinson (La.), 466.
Davis *vs.* Police Jury, 1st Louisiana Annual, 294.
De Armas *vs.* Mayor, etc., 5th La., 132–198.
Choppin *vs.* Michel, 11th Robinson (La.) Reports, 240.

O'Reilly's regulations were not made even for the guidance of himself, as governor, but prescribed rules of conduct for the subordinate officers of the colony. They could in no respect bind or restrain the power of the governors who succeeded him, they possessing the same power as he, O'Reilly, himself possessed, and hence free to modify, abrogate, or by their personal acts disregard his regulations.

Of these latter it has been said that they were the language of a man who supposed himself to possess full power over the subject to which the regulations pertained; that the rules prescribed for himself did not purport to be limits imposed by a master, but to be marked out by his own discretion and to be alterable at his will; that he made no allusion to orders emanating from his sovereign, and, marking out the narrow path he was bound to tread, he gave the law himself in the character of a man invested with full powers.

United States *vs.* Clarke, 8 Peters, 455.

Speaking again of the regulations of O'Reilly, it was said in Delassus *vs.* United States, 9 Peters, 135, that—

"It was apparent that these regulations, were intended for the general government of subordinate officers; not to control and limit the power of the person from whose will they emanated.

"The Baron de Carondelet, we must suppose, possessed all the powers, that had been vested in Don O'Reilly; and a

concession ordered by him, was as valid as a similar concession directed by Governor O'Reilly, would have been. Had Governor O'Reilly made such a grant, could it have been alleged that he had disabled himself, by his instructions for the regulations of the conduct of his subordinate officers; instructions which the power that created, must have been capable of varying or annulling; from exercising the power created in him by the Crown?"

It is known historically that Governor Miro possessed in the colony of Spain all the power and sovereignty that was vested in the king. It has been said that the sovereign power of a State or kingdom which holds public domain for the benefit of the general community is not restricted by forms as to the manner in which they assign or lay out in part land to an individual, in full dominion of property. While it is true that this is generally done by written titles, emanating from proper authorities, it was not in violation of any principle of natural or equity law or of sound policy to say that when part of the public land is separated from the rest by metes and bounds and an individual put in possession of it as his own, he acquires title thereto.

Sanchez *vs.* Gonzales, 11 Martin (La.) Reports, Old Series, 211.

Le Blanc *vs.* Viator, 6 Martin (La.) New Series Reports, 256.

The Spanish government recognized verbal as well as written grants.

Landry *vs.* Martin, 15 La. Reports, page 9, citing Strother *vs.* Lucas, 12 Peters, 437.

It was held in 68 Federal Reporter, 640, 641, that the Filhiol grant was imperfect and incomplete, for the reason that the land conceded was not described with sufficient particularity to identify it or fix its location; that, until actual survey was made of it, it was only a floating and unlo-

cated claim which segregated no specific parcel of land from the public domain.

It appears from the terms of the grant itself that Filhiol had already been placed in possession of the tract by Trudeau, surveyor general, which is an indication of the strongest kind that the land granted was definitely known by metes and bounds, sufficiently at least to enable the grantee to take as well as to be placed in possession of the thing granted. It also appears from the grant that the "governor had prior to its execution made an examination of the proceedings had (or acts done)" by Trudeau, the surveyor general, "concerning the possession which he had given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land one league square," etc. Referring evidently to the official governmental survey which was to follow the grant itself, the latter declares "that this land is to be measured so as to include the said locality known by the name of Hot Waters, as is besides stated by the figurative plan and certificate of the said surveyor, Trudeau." This is a clear statement that a plan and certificate of survey had been made by Trudeau prior to the grant, and that this was before the governor when the grant was made, and it is a fair inference that the "proceedings had or acts done" by Trudeau, which, by the opening words of the grant, were declared to have been examined by the governor, were the surveying operations of which the "figurative plan and certificate" of Trudeau supplied the record. The further declaration of the governor in his grant of his recognition of the "figurative plan and certificate" as being in conformity to the order of survey strengthens the assumption that before the grant was executed there had been an official survey of the land for the purpose of fixing its location and boundaries and identifying it to an extent sufficient to inform the governor of the precise location and extent of the tract conceded by the grant. This would appear conclusive from the following language of the

grant, which declared that, using the faculty vested by the king, in the governor, he, in the name of his royal master, granted the league of land unto Filhiol.

It may be said that all of these recitals are simply parts of the grant, which itself is disputed, and that nothing in it can be brought to establish the verity and binding force of the instrument of which they form a part.

In reply it may be stated that whether or not the grant is genuine, if not entirely a question of fact, is one of both law and fact, and predominately of law; the plaintiffs will be entitled to submit to a jury any question of fact concerning the genuineness or validity of the grant in question; this being established, the recitals contained in the instrument would import absolute verity; we have seen that the court will take judicial cognizance of the signatures of colonial governors and higher officials of the Spanish government, in control of the territory of Louisiana, and that any person questioning the same bears the burden of proof to destroy the *prima facie* showing made by the production of an instrument purporting to be the official act of the governor or secretary of the State.

It would appear that a description of land no more precise than that contained in the Filhiol grant has been held by this court to be sufficient; a grant of land by the Spanish governor of East Florida, described as "two thousand acres of land, he (the petitioner) solicits," which in the petitioner's *requette* was described as "two thousand acres of land, in the place called Ockla Waha, situated on the margin of the St. John river;" there was in this case no survey of the land until August 20, 1819, some months after the cession of Florida by Spain to the United States, which occurred February 22, 1819.

U. S. *vs.* Perchman, 7 Peters, 82, 83.

Another fact appearing from the record which would show conclusively that the description, location and boundaries

of the tract in question were fully known and understood by Miro, the governor; Armesto, his secretary; Trudeau, surveyor, and Filhiol, the grantee, is disclosed by the conveyance of Filhiol to Bourgeat, before Texier, military and civil commandant of the district, November 25, 1803, and the retrocession of the property by Bourgeat to Filhiol, before the judge of the court of Pointe Coupee, July 17, 1806.

By the regulation of Morales the comptroller and intendant of the province of Louisiana, in whom at the date in question, November 25, 1803, the power to grant lands had been vested by the king by a royal order of October 22, 1798 (U. S. *vs.* Moore, 12 Howard, 218 *et seq.*) notaries public in New Orleans and commandants of posts were forbidden to take any acknowledgments of conveyances of land obtained by cession, unless the seller or grantor presented and submitted to the buyer the title he had obtained, and, in addition, being careful to insert in the deed the metes and bounds and other descriptions "*which resulted from the title*" and the procès verbal of the survey, which ought to accompany it.

It must be presumed that when Filhiol sold the tract to Bourgeat by a deed passed before Don Vincente Fernandez Texier, military and civil commandant of the district, that the latter proceeded in strict accordance with the above regulation, which appears as article 7 of the instructions of Morales for conceding lands. (See second White's Collection of Laws and Local Ordinances, p. 236.) If Texier followed the instructions enjoined upon him by this article of the regulations of Morales, he required the seller or grantor, Filhiol, to present and deliver to Bourgeat, the buyer, the "title" which he had obtained, and it should be borne in mind that by the word "title" must be considered to mean the legal evidence of the right of Filhiol to the specific tract of land which he was in the act of selling to Bourgeat and which is fully described in his deed to the latter. This appears to have been "a tract of land with a front of eighty-

four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'Eau Chaude,' about two leagues distant from its entrance into the Ouchita, *having the Hot Springs for its centre*, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by land belonging to the Crown, the same which to me by virtue of a grant obtained from Senor Don Esteban Miro, the then governor of this province, dated the 12th day of December, 1787." This is shown to have been recorded in the proper office of the province of Louisiana in accordance with the laws then existing, and was also afterwards recorded in the said office; if Texier, the commandant, the representative of the Spanish government, approving or acknowledging the sale of Filhiol to Bourgeat, representing the king himself, observed the injunctions of article 7 of Morales' regulations, the description of the property sold, found in the deed of sale, was taken from the title or grant of Filhiol, since by article 7 the metes and bounds and other descriptions of the property conveyed must be those which result from the title and the procès verbal of the survey which ought to accompany it; the effect of this showing would be to establish that the grant of the governor to Filhiol with the official documents which accompanied it or were executed subsequently as a part of it described the land granted with sufficient particularity to enable Texier, acting for the government, to obtain a particular description therefrom which appears in the deed from Filhiol to Bourgeat.

The failure to produce the figurative plan and survey of Trudeau referred to in the grant evidently for the purpose of a more particular description of the boundaries and location of the tract granted is not sufficient for the dismissal of plaintiffs' suit upon a demurrer; if these documents ever existed at all, their non-production upon the trial sufficiently explained, secondary evidence of their contents would be received; surely the declaration of the plaintiffs' cause of ac-

tion is such that if established by proof on the trial of the merits it would entitle them to a judgment.

The second assignment of error is the following:

"That the court erred in holding, that the said treaty had not guaranteed and protected the said title."

The discussion of this assignment is largely involved in that of the first. If the Filhiol grant was complete under the Spanish government, it segregated from the public domain the land which it covered, and its effect was to make the latter private property. As such it passed from under the Spanish government, when by it the territory was ceded to France, and as such in turn passed to the United States under the treaty of cession. The American Government under the treaty acquired title to public property alone. Private titles were not divested or in any manner impaired by the several changes of sovereignty.

La Vergne's Heirs *vs.* Elkins' Heirs, 17 La. Rep., p. 220.

Riddle *vs.* Ratlif, 8 La. Annual, p. 106.

Murdock *vs.* Gurley, 5th Robinson (La.) Rep., 457; 2 La. Ann. Rep., p. 149; 5th Martin (La.) Rep., p. 653.

Ainsa *vs.* New Mexico, etc., R. R., 175 U. S., p. 81.

By the third article of the treaty concluded between France and the United States April 30, 1803, it was expressly provided that the inhabitants of the ceded territory should be maintained and protected in the full enjoyment of their liberty, property, and the religion they profess.

Treaties and Conventions of the United States, p. 332.

Therefore, if the Filhiol grant was complete before the territory of Louisiana was ceded to the United States, the latter acquired no title to it, and it was beyond the reach or power of Congress or the executive departments.

"That the court erred in holding that this action is barred by the provisions of the act of Congress, approved July 7th, 1870, (16 Statutes at Large)," is the seventh assignment.

The act of 1870 has no reference whatever to the present suit; it authorizes suits against the United States, to be instituted in the Court of Claims, for the recovery of the whole or any part of the four sections of land constituting the Hot Springs reservation.

This suit is not against the United States, although a judgment in favor of plaintiffs would annul the title of the United States; the latter cannot be sued except with its consent; the act of 1870 was designed to permit the government to be sued for the recovery of the whole or any part of the property in question, the suit to be brought, however, within ninety days from the passage of the act; by section one jurisdiction of such suits was conferred upon the Court of Claims.

Plaintiffs are not seeking any remedy which is created by the act of 1870; the suit is not brought against the United States, nor is it instituted in the Court of Claims; the right to bring a suit like the present one existed prior to, and altogether independent of, the act of 1870; plaintiffs seek to avail themselves of no right or advantage conferred by the act of 1870, and hence are not bound by any of its conditions or limitations.

In United States *vs.* Lee, 106 U. S. Rep., page 196, it was held that the doctrine that the United States cannot be sued except where Congress had provided has no application to officers or agents of the United States, who, when, as such, holding, for public uses, possession of property, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may by a court of competent jurisdiction be the subject-matter of inquiry and adjudged accordingly. In the course of the opinion in that case it was said that the claim that such a suit could not be maintained against the individuals in possession of

the property, because it was against the Government, was opposed to all the principles upon which the rights of the citizen when brought in collusion with the acts of the Government must be determined; that in such cases there is no safety for the citizen, except in the protection of the judicial tribunals for rights which have been invaded by the officers of the Government professing to act in its name. If such judgments should not be sustained no remedy could be afforded a party, however clear his rights, when it was seen that his opponent was an officer of the United States, claiming to act under its authority (see pages 218, 219); that the defense was based solely upon the immunity from judicial inquiry of every one who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power; that courts of justice were established not only to decide upon the controverted rights of citizens as against each other, but also upon rights in controversy between them and the Government. (See page 220.)

This case contains reviews of prior decisions, extending as far back as United States *vs.* Peters, 5th Cranch, 115. All going to show that suits of a character like the present may be maintained against the Government by bringing into court its officers or agents who have the custody and are in charge of the property sued for.

In Tindal *vs.* Westley, 167 U. S., 204, the rule announced in United States *vs.* Lee was affirmed, the court declaring that "the settled doctrine of this court wholly precludes the idea that a suit against an individual to recover possession of real property is a suit against the State, simply because the defendant holding possession, happens to be an officer of the State, and asserts that he is lawfully in possession on its behalf."

"Whether the one or the other party is entitled in law to possession, is a judicial, and not an executive or legislative question. It does not cease to be a judicial question, because

the defendant claims that right of possession is in the government of which he is an officer or agent (167 U. S., 221)."

Lee *vs.* United States holds that defendants in possession of property under the United States when sought to be ousted by suit must show that their possession under and on behalf of the United States is by virtue of some valid authority (114 U. S., 289).

"The fact that the defendant in a suit for possession of land, is an officer of the Navy of the United States, and is acting under their orders, gives no justification to the retention of the premises against the claim of the true owners. The Government of the United States is one of law, and its officers cannot deprive any citizen of its property, except as the law authorizes it, and no law can authorize it except upon just compensation to its owners."

San Francisco Sav. Union *vs.* Irwin, 28 Federal Rep., 708–715.

An officer of the United States in charge of a Government armory can be sued for infringement of a patent, although all his acts in relation thereto have been performed under orders of the Government.

Head *vs.* Porter, 48 Federal Reporter, pp. 481, also 482.

See also Tindal *vs.* Westley, 65 Federal Reporter, pp. 231, also 235.

The mere fact that a defendant in ejectment is sued as controller of a State does not deprive the Federal courts of jurisdiction on the ground that the suit is against the State, while it is averred that the defendant withholds possession wrongfully.

Saranac Land & Timber Company *vs.* Roberts, 68 Fed. Rep., 521.

See also Stanley *vs.* Schwalby, 162 U. S., 255.

Respectfully submitted.

BRANCH K. MILLER,
Attorney for Plaintiffs in Error.

APRIL, 1904.

FILED
APR 21

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 252.

HIPPOLITE FILHIOL ET AL, PLAINTIFFS IN ERROR,

v.

GEORGE H. TORNEY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

WILLIAM F. VILAS,
Attorney for Plaintiff in Error.

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J. H. McGOWAN,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10490

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This is an action of ejectment, based upon the same title which has been twice presented to the court: First, in *Muse v. Arlington Hotel Company*, when the writ of error was dismissed because no jurisdiction in this court was shown by the record (168 U. S., 430); secondly, in *Filhiol v. Maurice*, when this court reversed the judgment of the circuit court which had taken jurisdiction and passed on the merits by sustaining demurrer) because the complaint did not show jurisdiction in that court (185 U. S., 108).

To the complaint in this cause a demurrer likewise was interposed, and later an amended demurrer, the latter upon

three grounds, viz: 1. Want of jurisdiction of the person; 2. Want of jurisdiction of the subject-matter; 3. Failure to state a cause of action.

Transcript of Rec., pp. 21 and 32.

This demurrer the circuit court sustained "to the jurisdiction of this court," and dismissed the complaint (*Trans.*, p. 33). An opinion by the district judge was also filed with the order, which goes entirely upon the want of jurisdiction (*Trans.*, pp. 34–36). To that judgment this writ of error was sued out.

THE COMPLAINT sets forth that Don Juan Filhiol, the ancestor of the plaintiffs—his only descendants and heirs—was born in 1740, settled in Louisiana in 1779, was appointed in 1783 by the King of Spain a captain in his army and commandant of the militia, assigned to duty at Ouachita by Don Estevan Miro, governor general from 1783 to 1789, inclusive, and that "as a reward for his civil and military services in his capacity as commandant of that then important post, and other valuable and distinguished services by him rendered to the King of Spain," the said governor general, who was fully empowered thereto, made to him on February 22, 1788, in the King's name, a grant of one square league of land at Hot Springs, now in Garland county, Arkansas, by due description therein set forth; that after the cession of Louisiana to the United States and after the extinguishment in 1818 of the Indian right of occupancy, plaintiff's ancestor leased in 1819 the granted premises to Dr. Stephen P. Wilson for a five years' term, and he entered into possession, continued some time in possession, and made some improvements. But in 1821 their ancestor, then a citizen and resident of the State of Louisiana, in which Territory he had resided for over forty years, died; that for want of the original grant, which had infact

been left in the possession of R. P. Bowie, a distinguished lawyer, without the knowledge of Filhiol's surviving heirs, they were embarrassed in the prosecution of their rights; and it was not until 1883 that the grant was found among the effects of Mr. Bowie's widow, under circumstances detailed and shown by affidavits, and restored to the heirs.

The practice of Arkansas requires a complaint in ejectment to set out the instruments of title and transfer, for which reason this complaint exhibits them *in extenso*, including a conveyance by Filhiol to his son-in-law, Bourgeat, in 1803, pursuant to the prescribed regulations for such purpose by Governor Morales, and a retrocession by Bourgeat to Filhiol in 1806.

For present needs it is unnecessary to present here further details, because upon this demurrer the validity and sufficiency of the grant are not open to question; and, indeed, upon the former arguments in the causes mentioned have been, it is believed, abundantly and convincingly shown.

The *locus in quo* now sued for is parcel of the original grant and consists of the plot of ground occupied as the site of the Army and Navy general hospital at Hot Springs.

After setting forth the title and facts above summarily stated, the complaint proceeds with the following averments now chiefly interesting:

"And for cause of action these plaintiffs say that by the third article of the treaty between the United States and the Republic of France, ratified on the 21st day of October, 1803, by which the province of Louisiana was acquired by this Government it was agreed and established that the inhabitants of said province should, among other things, 'be maintained and protected in the free enjoyment of their * * * property;' that such provision, by a just construction of said treaty, extended to the property of the said Don Juan Filhiol, the plaintiffs' ancestor, so as aforesaid granted to him, and also to the rights of these plaintiffs as his heirs in and to the same, and so far forth qualified the rights of property acquired by the United States thereunder; but that, nevertheless denying that these

plaintiffs were entitled to be maintained and protected in such enjoyment of their said property by any construction of said treaty, the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained, and, prior to the commencement of this suit, did by their officers and agents expel the plaintiffs from possession of the said land last above described, which is parcel of the aforesaid grant to their said ancestor, and did deliver over such possession to the defendant in this action sometime before the commencement thereof, to wit: on the first day of January, A. D. 1900, and did then establish him in such possession thereof wrongfully and unjustly; that since said date and for more than two years, the said defendant has so remained in possession of said land in controversy claiming the same for the United States as superintendent of the U. S. Army and Navy hospital, ousting the plaintiffs and denying their right thereto, by direction of the United States and in pursuance of the unlawful and unjust possession so given by them to him, and without any other right or claim of right thereto on the part of said defendant except as such superintendent and as a public officer of the United States. And that the cause of action of these plaintiffs against the said defendant arises out of said treaty and draws in question the construction thereof.

"And also these plaintiffs say that they were by inheritance from their said ancestor lawfully possessed of the land in controversy, as parcel of said grant to him made as aforesaid, but that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation to these plaintiffs, and did as aforesaid by their officers and agents expel these plaintiffs from possession of the land in controversy, and before the commencement of this action, to wit, on the first day of January, A. D. 1900, established the defendant in possession thereof wrongfully and unjustly, and so he has since remained as aforesaid pursuant to such acquisition of possession by him, and by direction of the United States, and without any other right or claim of right thereto, and has all said time ousted these plaintiffs. And so their cause of action arises under the Constitution of the United States and involves the application thereof for the protection of their just rights."

The foregoing comprises all the facts in the record which seem material to the consideration of the questions now arising upon it; but, as seems to be permissible under the practice in Arkansas, the defendant has not only demurred, but answered as well, the answer not overruling the demurrer. That answer went up as part of the record of the cause. So being, it may, at least, be referred to in argument for the help it affords to the plaintiffs' positions.

THE JURISDICTION.

This appears to rest securely upon either of the two grounds which the complaint suggests: the meaning and force of the treaty of 1803, or the application of the Constitution.

1. The district judge, presiding in the circuit court, summarily disposed of the first of the two grounds without further consideration than to remark that "the allegations of the complaint as to the rights of plaintiffs under the treaty with France are practically the same as were those in the former cases and which the Supreme Court held were insufficient to confer jurisdiction."

It is respectfully submitted the plaintiffs are entitled to a more discriminating reading of their complaint.

In *Muse v. Arlington Hotel Company* the jurisdiction was laid upon the citizenship of the parties, and the case determined below on demurrer upon questions not involving either the treaty or the Constitution. Upon the record there the circuit court of appeals possessed the right of final judgment. So this court held, saying:

"As ruled in *Ansbro v. United States*, 159 U. S., 695, 697, 'a case may be said to involve the construction or application of the Constitution of the United States when a title, right,

privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision' (*Green v. Cornell*, 163 U. S., 75, 78).

"The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted (*Borgmeyer v. Idler*, 159 U. S., 408)."

Applying this doctrine, this court then said, with reference to the treaty basis:

"The amended complaint stated that plaintiffs would '*rely upon the following written evidences of their title* for the maintenance of this action,' and enumerated, among them, 'the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803,' * * * *but nowhere was any right, title, privilege or immunity asserted to be derived from either Constitution or treaty. There was nothing to indicate in what way, if any, the cause of action was claimed to arise from either.*"

In *Filhiol v. Maurice*, which was ejectment against the tenants of a bath-house site, the jurisdiction was attempted to be placed upon the same grounds now asserted. The circuit court assumed jurisdiction, and sustained a demurrer to the complaint upon the merits. This court entertained the writ of error, but reversed the judgment because the circuit court had no jurisdiction, saying:

"But no right, title, privilege or immunity was here asserted as derived from the Constitution or the treaty, *as against these private individuals*, who were impleaded as defendants, either specifically, *or through averments that plaintiffs were ousted in violation of the treaty and of the fifth amendment*, the provisions of which *it was the duty of the Federal Government* to observe.

"The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought, but it was not made to appear that the circuit court had jurisdiction, for the action was not against the United States, nor could it have been, as the United States had not consented to be so sued; and so far as defendants were concerned, it was *not charged that they took possession by direction of the Government*, and plaintiffs set up no more than a wrongful ouster *by merely private persons*, remediable in the ordinary course, and in the proper tribunals."

This authoritative definition of the defects of the several complaints in the two former causes, sharply indicated by the words italicized for the purpose, enables such ready comparison with the complaint in this cause above quoted that nothing more is necessary. These decisions have cleared the path. They plainly direct how the obvious facts of the plaintiffs' case should be stated in order to invoke the power of the Federal courts to redress the denial of their rights, and they have been so pleaded accordingly.

As concerns the treaty, the complaint sets forth its engagement for maintenance and protection of the inhabitants of the ceded territory in the free enjoyment of their property, in qualification of the rights of sovereignty and proprietorship which the United States took from that instrument; avers that by just construction this guaranty extended to the rights of inheritance of these plaintiffs from their ancestor, who was such an inhabitant and who became a citizen of the United States; that the United States, denying any construction of the treaty to be sufficient to that end, asserted its title to the property in question by virtue of the general cession to it of the territory, regardless of the qualifying exception; expelled the plaintiffs from their possession, and wrongfully and unjustly put the defendant in such possession; that the defendant has for more than two years since January 1, 1900, continued as a trespasser in such possession,

ousting the plaintiffs and denying their rights by direction of the Government, and with no other right or claim of right to the property than so derived, and that the plaintiffs' cause of action arises upon the treaty and draws in question its construction.

Thus both the plaintiffs' right to the free enjoyment of their property and their immunity from the invasion of that right are deduced from the treaty and asserted to be derived from it; and it is charged that the defendant's trespass was first committed, and has been since continued, "by direction of the Government," one of the parties to the public engagement which has been so violated. These averments, admitted by the demurrer, assuredly meet all the defects in the former complaints pointed out by the court and make a case so explicit that it is difficult to conceive of a stronger assertion.

A grant is shown which, by the law and customs of Spain, was ample to vest in the grantee a title complete, perfect, and exclusive. This grant had been enjoyed without a question of its validity or its complete investiture of entire title for fifteen years under Spanish law at the time of the treaty. Was that title "property"? If so, what is the "free enjoyment" of it, in which the grantee was to be maintained and protected? What the extent to which maintenance and protection should go? Is the right of transmission to his heirs one of the features of the right of property to be maintained and protected? Is it a breach of the obligation assumed to take this property from the heirs by one contracting party and bestow the possession and use of it upon the defendant, without their consent, and without compensation? Does the contracting Government fulfil that obligation by enacting a statute requiring them to bring a suit in the Court of Claims at Washington within ninety days of its passage, without notice to them and without their actual knowledge of the requirement, and upon the

lapse of such time to seize it as forfeited to the Government on whose protection in their free enjoyment of it they had the right to rely?

Obviously these and other questions arise upon the facts stated, and necessarily involve construction. In short, since one view of the treaty's meaning will support the right of property asserted by these plaintiffs, and its immunity from invasion by the acts complained of, although the contrary might defeat them, construction is involved and the case "arises" under the treaty.

Starin v. New York, 115 U. S., 257.
R. R. Co. v. California, 118 *Id.*, 109.
Ames v. Kansas, 111 *Id.*, 449.

These cases are direct to the point; and in *United States v. Arredondo*, 6 Pet., 691, on page 712, the court, speaking of a similar article in the Florida treaty, quotes from a previous decision "that it has been very truly urged by the counsel of the defendant in error that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and is never refused." And then proceeds:

"When such an article is contained in a treaty of cession and its meaning submitted to our consideration, we shall follow up and effectuate the intention of Congress by deeming the subject-matter to be, whether the land in controversy was *the property of the claimants* before the treaty, and, if so, that its protection is as much guaranteed by the laws of a republic as the ordinances of a monarchy."

Similar language was used in the opinion in *United States v. Chaves*, 159 U. S., 458.

It is interesting on this point to turn to the answer which the United States attorney, as the attorney for the defendant, has, by direction of the Attorney General (Trans., p. 32), interposed to meet the facts set out by plaintiffs. It "denies that the provision of the third article of the treaty * * * referred to in the said complaint, *extended to the property* of the said Don Juan Filhiol or the rights of the said plaintiffs as his heirs in and to the same, or that it qualified the rights of property acquired by the United States thereunder" (Trans., pp. 27, 28). And at a later point, "further answering, says that by the treaty of cession * * * the Republic of France, being at the date of said treaty the absolute owner of the premises *here in controversy*, conveyed the same to the United States of America, and that the latter has ever since been the sole and absolute owner in fee-simple of said property" (Trans., p. 31).

While it is not contended but that the jurisdiction must appear with entire sufficiency from the complaint alone, it affords satisfaction so to demonstrate that the allegations of it, abundantly adequate it is thought, are thus shown to state truly the crux of the contest to rest in construction of the treaty.

The case of *Florida v. Furman*, 180 U. S., 436, seems to render all discussion needless. Seemingly there is no distinction in principle between that case and the one at bar. If difference exist, it consists in the greater amplitude of the facts set forth here to support the jurisdiction of the Federal court.

And see—

Rice v. Ames, 180 U. S., 371–'4.
Terlinden v. Ames, 184 U. S., 270.
Ornelas v. Ruiz, 161 U. S., 502–'7.

2. Like argument demonstrates that the claim of the application of the Constitution supports and demands the exercise of the Federal judicial power. In fact, the prohibitions against deprivation of property without due process of law and against taking for public use without just compensation, contained in the fifth amendment, are but the converse of the treaty engagement, the constitutional forbiddance of those acts by which public authorities usually impair, when they assail at all, the free enjoyment of property.

In such a case as this the two cover the same ground, the one by affirmative engagement, the other by negative defense; the one to guaranty the right, the other to assure immunity against its invasion.

And when the facts are admitted to be that the United States deprived these plaintiffs of their property without *any* process of law and, without legal right, took it for public use without *any* compensation, and that this defendant as a trespasser upon their rights continues to hold it against them solely by such claim and for such use, it would seem too plain for words that the injury should be redressed by the tribunals to which judicial power in such causes is committed. If by refinements and subtleties such a plain guaranty can be done away with at all, it would be needless to proffer reason against them.

The court below disposed of this matter by holding that the above-mentioned averments of the complaint were only anticipatory of the defense, hence but surplusage, and therefore not to be considered; whereby "there is clearly no Federal question involved and the court is without jurisdiction."

It is hard to see why such reasoning would not always deny the service of the Federal tribunals to a suitor so injured. In *Muse v. Arlington Hotel Company* this court said, and repeated in *Filhiol v. Maurice*: "And it is settled that in order to give the circuit court jurisdiction of a case so arising, that it does so arise must appear from the plaintiff's

own statement of his claim;" and referred to *Colorado Central Mining Co. v. Turck*, 150 U. S., 138; *Press Publishing Co. v. Monroe*, 164 U. S., 105, among many such decisions. The district judge cited also cases in which it was held that the want of such jurisdictional averments could not be supplied by the defendant's pleading, and might have added others. Such averments cannot be both necessary and surplusage. Those in the complaint at bar are not justly to be characterized as anticipatory of a defense. They are jurisdictionally descriptive of the injury which the action seeks redress of. They simply show the governmental action, which violated the Constitution, not a private injury, which would not so operate, according to the rule laid down in *Filhiol v. Maurice*.

It is enough that the demurrer confesses their truth; but by judicial notice of public action the court is also acquainted with their truth.

3. It is suggested that the action cannot be maintained against the defendant, because in effect against the United States, which have not consented to be so sued. This point must be deemed at rest by the many well-considered decisions of this court which have distinguished the two classes of actions, in one of which the United States, or a State, is to be regarded as defendant, in the other not so. The defendant here is answerable as a trespasser; his own claim to hold the property from the plaintiffs is only involved. The United States is in no sense the party, and its rights are not to be adjudicated, except in so far only as the defendant relies upon its authority, or want of authority, to justify his own. The action is to recover possession of land, to which it is essential the plaintiffs shall show title and right of possession. If the defendant can show title in the United States he will prevail. But he cannot defeat the plaintiffs' just rights as against himself by merely showing that he

takes all his claims from the United States when it also appears that he thereby acquired no legal right to the possession.

But discussion is unnecessary; even unwarranted at the bar. It has been exhausted and authority overrides it. In *Tyndal v. Wesley*, 167 U. S., 204, the reasons for sustaining such an action, and the approval of them by repeated adjudications in this court, are so fully shown by Mr. Justice HARLAN that the subject must be left with but a citation of the cases for convenience—

United States v. Lee, 106 U. S., 196.
Pennoyer v. McConnaughy, 140 *Id.*, 1, 10.
In re Tyler, 149 *Id.*, 164, 190.
Scott v. Donald, 165 *Id.*, 58, 68.
United States v. Peters, 5 Cranch, 115, 139.
Meigs v. McClung's Lessee, 9 *Id.*, 11.
Osburn v. Bank of United States, 9 Wheat., 738.
Davis v. Gray, 16 Wall., 203.
Smyth v. Ames, 169 U. S., 466.
Scranton v. Wheeler, 179 *Id.*, 141, 152.
Prout v. Starr, 188 *Id.*, 537, 542–'3.
McGahey v. Virginia, 135 *Id.*, 662.
Poindexter v. Greenhow, 114 *Id.*, 270, 285, *et seq.*
Board of Liquidation v. McComb, 92 *Id.*, 531.
Reagan v. Farmers' L. & T. Co., 154 *Id.*, 362, 388, *et seq.*

And see also—

Wilcox v. Jackson, 13 Pet., 498.
Governor of Georgia v. Madrazos, 1 *Id.*, 110.
Grisar v. McDowell, 6 Wall., 363.
Brown v. Huger, 21 How., 305.
The Siren, 7 Wall, 152.
The Davis, 10 *Id.*, 15.
Shelton v. Platt, 139 *Id.*, 591.
Allen v. B. & O. Rr. Co., 114 *Id.*, 311.
Litchfield v. Webster County, 101 *Id.*, 773.
Stanley v. Schwalby, 147 *Id.*, 508; *S. C.*, 162 *Id.*, 255.

The cases in which actions against officers have been held to be in fact against the Government or a State aid to make clearer the line of demarkation between the two classes and to show the place of this cause to be within the other class.

Fitts v. McGhee, 172 U. S., 5, 9.
Harkrader v. Wadley, ibid., 148, 169.
Smith v. Reeves, 178 *Id.*, 436.
In re Ayres, 123 *Id.*, 443.
North Carolina v. Temple, 134 *Id.*, 22.
Cunningham v. Rr. Co., 109 *Id.*, 446.
Hagood v. Southern, 117 *Id.*, 52.
Belknap v. Schild, 161 *Id.*, 10.

It is inconsistent with governmental dignity or justice that inquiry should be refused into the question of title, which any officers with purpose or without authority have seized; and what even monarchies never deny in such cases, it would be a peculiar reproach to a republic to strangle.

Inasmuch as the opinion below is not only limited to the question of jurisdiction, but the judgment by its terms goes entirely upon the want of it, so that the record leaves no opportunity to imply any determination on the merits to the court below, it is supposed no argument will be allowed upon that branch of the case; but, if so, counsel will be ready to submit it at the bar.

WILLIAM F. VILAS,
Attorney for Plaintiff in Error.

JAMES K. JONES,
J. H. MCGOWAN,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS in error,
v.
GEORGE H. TORNEY.
No. 252.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

This is a suit in ejectment, brought by the heirs and descendants of Don Juan Filhiol, to obtain possession of "an irregular tract or plot of ground known as the site of the Army and Navy General Hospital, upon which, and within the boundaries of which, was built and is now standing the building used and occupied and known as said Army and Navy General Hospital, being the lot described on the records of the Interior Department as the site for said hospital in said (the) city of Hot Springs." It is stated that the said tract of land was included in "a league of land, being a tract of about 3 miles square, embracing all the hot springs in the city of Hot Springs, Garland County, Arkansas,"

of which the ancestor of plaintiffs was the owner and entitled to the possession at the time of his death.

This is the fourth suit brought by these plaintiffs to have determined, directly or indirectly, their right to possession of the "hot springs of Arkansas." The first was brought under the provisions of the act of June 11, 1870 (16 St. L., 149), in the Court of Claims. That suit was dismissed for want of jurisdiction; and, on appeal to this court, affirmed for want of prosecution. (*Filhiol* v. *United States*, 163 U. S., 686.) The second, *Muse* v. *Arlington Hotel Co.* (68 Fed. Rep., 637), was an action in ejectment in the circuit court of the United States for the eastern district of Arkansas. To the amended complaint therein the defendant demurred, and also filed an answer and exceptions. The circuit court sustained the demurrer and exceptions and entered judgment dismissing the complaint, whereupon a writ of error was sued out directly to this court. This writ of error was dismissed, the court holding (syllabus): A case does not involve the construction or application of the Constitution of the United States, or the validity or construction of a treaty, so that writ of error will lie directly from this court to the United States circuit court merely because the complaint in ejectment states a reliance on a certain article of a treaty and the fifth amendment of the Constitution, without asserting that any right, title, privilege, or immunity is derived from either Constitution or treaty, or indicating in what way the cause of action is claimed to arise from either, when the court does not decide any question as to the

application or construction of the Constitution or validity or construction of the treaty, but holds that plaintiffs' title failed because of non-compliance with Spanish law. (*Muse* v. *Arlington Hotel Co.*, 168 U. S., 430.)

The third suit was an action of ejectment for the recovery of a parcel of land included in the same alleged grant above referred to. It was averred in the complaint: "And for cause of action, say, that by the Fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the lands in controversy and their full enjoyment of the same, but, in violation of the provision of said treaty, and without due process of law, and in violation of the fifth amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the 2d day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession, and they now hold possession of the land in controversy, wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs." Defendants demurred on the ground that the allegations of the complaint did not constitute a cause of action. The court sustained the demurrer, dismissed the complaint, and a

writ of error directly to this court was allowed. It was here decided that the circuit court had no jurisdiction, upon the plaintiffs' statement of their claim; and the judgment was reversed and the cause remanded, with a direction to dismiss the complaint for want of jurisdiction. (*Filhiol* v. *Maurice*, 185 U. S., 108.)

In the same court, on August 14, 1902, the same plaintiffs brought this, their third suit in ejectment for a parcel of land included in the same tract claimed under this alleged Filhiol grant. The allegations of the complaint are identically the same as in the other suits, except in the statements to bring the action within the jurisdiction of the circuit court. Those allegations are as follows (Tr., 11, 12): "And for cause of action these plaintiffs say that by the third article of the treaty between the United States and the Republic of France, ratified on the 21st day of October, 1803, by which the province of Louisiana was acquired by this Government it was agreed and established that the inhabitants of said province should among other things, 'be maintained and protected in the free enjoyment of their * * * property;' that such provision, by a just construction of said treaty extended to the property of the said Don Juan Filhiol, the plaintiffs' ancestor, so, as aforesaid, granted to him, and also to the rights of these plaintiffs as his heirs in and to the same, and so far forth the qualified rights of property acquired by the United States thereunder; but that, nevertheless, denying that these plaintiffs were entitled to be maintained and protected

in such enjoyment of their said property by any construction of said treaty, the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained, and prior to the commencement of this suit did by their officers and agents, expel the plaintiffs from possession of the said land last above described, which is parcel of the aforesaid grant to their said ancestor, and did deliver over such possession to the defendant in this action some time before the commencement thereof, to wit, on the 1st day of January, A. D. 1900, and did then establish him in such possession thereof wrongfully and unjustly; that since said date, and for more than two years, the said defendant has so remained in possession of said land in controversy, claiming the same for the United States, as superintendent of the United States Army and Navy Hospital, ousting the plaintiffs and denying their right thereto, by direction of the United States, and in pursuance of the unlawful and unjust possession so given by them to him, and without any other right or claim thereto on the part of said defendant, except as such superintendent and as a public officer of the United States. And that the cause of action of these plaintiffs against the said defendant arises out of said treaty and draws in question the construction thereof."

"And also these plaintiffs say that they were by inheritance from their said ancestor lawfully possessed of the land in controversy, as parcel of said grant to

him made as aforesaid, but that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation to these plaintiffs, and did as aforesaid by their officers and agents expel these plaintiffs from possession of the land in controversy, and before the commencement of this action, to wit, on the 1st day of January, A. D. 1900, established the defendant in possession thereof wrongfully and unjustly, and so he has since remained as aforesaid pursuant to such acquisition of possession by him, and by direction of the United States, and without other right or claim of right thereto, and has all said time ousted these plaintiffs. And so their cause of action arises under the Constitution of the United States and involves the application thereof for the protection of their just rights."

To this complaint defendant, by the United States attorney, demurred, stating as causes of demurrer:

First. That the court has no jurisdiction of this action.

Second. That the complainant does not state facts sufficient to constitute a cause of action. (Tr., 21.)

Subsequently, on December 31, 1902, the defendant, by the United States attorney, "duly authorized to appear herein for said defendant by Hon. H. M. Hoyt, Acting Attorney-General of the United States," filed his answer to complaint and exceptions to exhibits. (Tr., 22–31.)

And, on January 2, 1903, the defendant, by the United States attorney, "duly authorized to appear herein for said defendant by the Attorney-General of the United States," filed his amended and substituted demurrer, stating as causes of demurrer:

First. That the court has no jurisdiction over the person of the defendant.

Second. That the court has no jurisdiction over the subject-matter of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action. (Tr., 32.)

On January 12, 1903, the court rendered the following judgment (Tr., 33):

> * * * the court being now well and sufficiently advised of the matters arising on the demurrer and the substituted demurrer, argued and submitted at a previous day of this term, considers that the same be sustained:
>
> It is therefore considered, ordered, and adjudged that said demurrer to the jurisdiction of this court be and the same is hereby sustained, and that the complaint of plaintiff be dismissed.

From this judgment a writ of error was allowed directly to this court. (Tr., 38, 39.)

The only question involved in this writ of error is that of the jurisdiction of the circuit court. The judgment of the court is definite upon this point. The first seven assignments of error are based upon it, and the

eighth assignment is referable to it alone by connection with the judgment.

United States v. *Jahn*, 155 U. S., 109.

Re Lehigh Mining and Manufacturing Co., 156 U. S., 322.

Interior Construction and Improvement Co., v. *Gibney*, 160 ib., 217.

Filhiol v. *Maurice*, 185 ib., 108.

There are two grounds alleged in the complaint to support the jurisdiction of the circuit court:

First. That the cause of action arises under a treaty made under the authority of the United States.

Second. That the cause of action arises under the Constitution of the United States.

The provision of a treaty invoked is the third article of the treaty between France and the United States, which is in these terms:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess. (8 Stat., 202.)

It is alleged in this complaint in ejectment that the ancestor of the plaintiffs was entitled to the possession of these lands by virtue of a grant made by the Spanish governor of Louisiana at a time when they were

within the sovereignty of Spain. By the secret treaty of St. Ildefonso, of October 1, 1800, the province of Louisiana was ceded by Spain to France. This cession was effected in the following March, but possession was not given until November, 1803. Meanwhile, on the 30th of April, 1803, a treaty was concluded at Paris, between the First Consul of France and the commissioners of the United States, by which France ceded, forever and in full sovereignty, the province of Louisiana to the United States. This treaty was not made known until after the delivery of possession to France was enthusiastically expected and arranged for.

Salcedo, Spanish governor of the provinces of Louisiana and West Florida, and the Marquis de Casa-Calvo were joined in a commission for the delivery of the possession of the province to the commissioners of France. On the 18th of May they issued a proclamation, announcing the intention of their sovereign to surrender the province to the French Republic, and that His Majesty had determined, among other things:

> He declared his expectation, from the sincere friendship and alliance which existed between him and the French Republic, that * * * the tribunals established for the administration of justice, and ordinary judges, should be allowed to continue to administer it according to the former laws and usages of the province; the inhabitants maintained in the peaceable possession of their property, and all grants made to them by the former governors confirmed, even when not finally ratified by the King.

On the 30th of November, Laussat, commissioner of France, received possession. He immediately issued a proclamation in which he announced that the French domination was for an instant only, as he was on the eve of delivering possession to the commissioners of the United States. On the 20th of December Laussat gave to the commissioners on the part of the United States—Claiborne and Wilkinson—formal possession of the province of Louisiana. Claiborne assured the people they would be protected in the enjoyment of their liberty, property, and religion. (*Martin History Louisiana*, 289–296.)

In *Henderson* v. *Poindexter's Lessee* (12 Wh., 530, 535) Chief Justice Marshall uses this language:

> It has been very truly urged by the counsel for defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy, as well as of justice and humanity, is always required, and is never refused.

The declarations of the French and American commissioners were in recognition of these principles of international law. And so is the stipulation in the third article of the treaty of Paris. In *The United States* v. *Percheman*. (7 Pet., 51, 86), this court said:

> It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the coun-

> try. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and *felt by the whole civilized world would be outraged*, if private property should be confiscated, and private rights annulled. * * * Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change.

In *Foster and Elam* v. *Neilson* (2 Pet., 253, 314) this court said:

> Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule of the court.

To determine the validity of grants claimed to have been made by the Spanish authorities prior to the ratification of the treaty with France Congress has provided by statutes, such as the act of May 26, 1824 (4 Stat. L., 52), "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity

of their claims." It was made lawful for any person or persons, or their legal representatives, claiming lands, tenements, or hereditaments in that part of the late province of Louisiana which is now included within the State of Missouri or the Territory of Arkansas, by virtue of any French or Spanish grant, concession, or warrant of survey, legally made, granted, or issued before the tenth day of March, one thousand eight hundred and four, by the proper authorities, to any person or persons resident in the province of Louisiana, at the date thereof, or on or before the tenth day of March, one thousand eight hundred and four, and which was protected or secured by the treaty between the United States of America and the French Republic, of the thirtieth day of April, one thousand eight hundred and three, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty been transferred to the United States * * * such person, etc., may present a petition to the district court of the State of Missouri (or the superior court for the Territory of Arkansas), etc.

Other statutes, to the same end, have been enacted, complying with the natural obligations of the Government, whether independent of, or embodied in, treaties by which countries have been acquired. Perfect titles have remained confirmed; and inchoate or imperfect titles have been established "in conformity with the

principles of justice and according to the laws and ordinances of the government under which the claim originated."

In view of the foregoing principles, and of the expression and action of the political department, how can it be contended the allegations of this petition support a case arising under the treaty of 1803? In construing language of exception of cases from the jurisdiction of the Court of Claims, "growing out of or dependent on any treaty stipulation," this court, by Mr. Justice Lamar, said:

> In order to make the claim one arising out of a treaty within, the meaning of section 1066, Revised Statutes, the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation. (*United States* v. *Weld*, 127 U. S., 51, 57.)

But, indeed, as is noted within, this question appears to have been already decided in this court in relation to this very grant (*Muse* v. *The Arlington Hotel Co.*, 168 U. S., 430; *Filhiol* v. *Maurice*, 185 U. S., 108). In the former case this court, by the Chief Justice, said:

> The circuit court also held that plaintiff's title failed because of non-compliance with Spanish law. It was not pretended that the treaty, the validity of which was confessedly not in dispute, could be so construed as to compel judicial recognition of unconsummated

> claims, and it was for the circuit court to determine into what category the alleged grant fell. In doing so the construction of the treaty was not drawn in question in any manner (p. 437).

And in the second case, this court remanded the cause, with a direction to dismiss the complaint for want of jurisdiction. The court held that "no right, title, privilege, or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals who were impleaded as defendants, either specifically or through averments, that plaintiffs were ousted in violation of the treaty and of the fifth amendment, the provisions of which it was the duty of the Federal Government to observe.

To obviate the objections which were fatal to the complaint in that suit, the plaintiffs here have alleged that their ancestor and they were entitled to be maintained and protected in their enjoyment of their property by the above-mentioned stipulation of the treaty of Paris, and that the Government of the United States by their officers and agents expelled them from the possession of the land in controversy and that the defendant remained in such possession claiming the land as superintendent of the United States Army and Navy hospital, etc., which was a cause of action arising out of the treaty. It is difficult to see how those allegations, taken in in connection with the other statements of the complaint, make any different case from the one heretofore before the court. In other words, what specific right

arising from the treaty is thus shown upon which jurisdiction is given to the circuit court? Reference is made to the case of *Mitchell* v. *Furman* (180 U. S., 402); but the distinction is clearly drawn between that case and this and fully disposes of plaintiffs' contention.

There is another view of this question which we will consider together with the claim that the jurisdiction should be maintained because the case arises under the Fifth amendment to the Constitution.

This is an ordinary action in ejectment which could have been, in its present form, brought in the State court. If the allegations of the complaint had been confined to those which were necessary under the State statute, there would be no jurisdiction in the United States Court. Can a plaintiff, by the averment of facts not essential to the cause of action or which are merely assertive of a supposed defense, bring his cause within the jurisdiction? In *State of Tennessee* v. *Union and Planters' Bank* (152 U. S., 454), Mr. Justice Gray, delivering the opinion of the court, said:

> In the first and second bills, the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the State under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of

> the United States, does not make the suit one arising under that Constitution or those laws (p. 464).

In *Sawyer* v. *Kochersperger* (170 U. S., 303), this court, by Mr. Justice McKenna, said:

> The case was removed into the circuit court of the United States, but improvidently, * * * notwithstanding the petition stated that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States.

In *Walker* v. *Collins* (167 U. S., 57) this court, by Mr. Justice White, recognizing the principle, said:

> As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred, the case comes directly within the operation of the rule cited (p. 59).

Adverting to the history of this case, is it not apparent that the whole attempt here is to make averments "for the purpose of creating a case cognizable by the circuit court, when none in fact existed?" The material allegations of the complaint are exactly the same as in the complaints in the former cases dismissed for want of jurisdiction. To create the jurisdiction the plaintiff inserted in this petition certain curative allegations that "the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained," and did expel the plaintiffs from

possession, "that the defendant has remained in possession," claiming the same for the United States "as superintendent of the United States Army and Navy Hospital," "by direction of the United States." And "that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation," and that the defendant remained in possession "by direction of the United States."

That is all. The pregnant phrase, "by direction of the United States," inartistically injected into the new complaint, is complacently referred to as meeting all the defects of the former complaints pointed out by the court. I do not understand directions were at that time being given how to frame a sufficient pleading.

The present pleading, as amended, for that is what it amounts to, does not present as strong a case for jurisdiction as was in *Florida Central and Peninsular Railroad Co.*, v. *Bill* (176 U. S., 321). This court, by Mr. Justice Shiras, discussing the case, said:

> It is obvious that all that is added, by these allegations, to the plaintiffs' statement of their own claim, is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of the declaration, the source of the defendant's title, but it

> could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a Federal question, can not create jurisdiction in a circuit court by anticipating the defendant's claim, and by alleging that the defendant will set up a defense under some law of the United States (p. 329).

There is no occasion to invoke the jurisdiction of a court of the United States. The courts of the State are the appropriate tribunals in which these questions should be determined, and there is no ground for reason or suspicion that in those courts full, fair, and impartial justice will not be done. If, however, from mistake or any cause, a wrong is there committed, in violation of the Constitution, or laws, or treaty made under their authority, ample redress and correction is provided by appeal to this supreme judicature. All this is apart from a matter of jurisdiction.

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Supreme Court of the United States.

No. 252.—October Term, 1903.

Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, et al., Plaintiffs in Error, *vs.* George H. Torney. } In error to the Circuit Court of the United States for the Eastern District of Arkansas.

[May 16, 1904.]

This was an action of ejectment commenced in the Circuit Court of the United States for the Eastern District of Arkansas, based upon the same title which was presented in *Muse* v. *Arlington Hotel Company*, (168 U. S. 430,) and *Filhiol* v. *Maurice*, (185 U. S. 108.) A demurrer to the complaint was sustained on the ground of want of jurisdiction and a judgment entered for the defendant, and thereupon the case was brought directly to this court on writ of error.

Mr. Justice Brewer delivered the opinion of the Court.

The only question decided by the Circuit Court was one of jurisdiction, but the record contains no certificate of that question nor anything which can be considered an equivalent thereto. The demurrer filed by the defendant stated three grounds therefor: First, a want of jurisdiction over the present defendant; second, a like want of jurisdiction over the subject matter of the action; and, third, that the complaint did not state facts sufficient to constitute a cause of action. The judgment was that the "demurrer to the jurisdiction . . . be sustained" and the complaint dismissed. In the opinion of the court only the question of jurisdiction over the subject matter was discussed. The assignment of errors contains nine specifications, some going to the matter of jurisdiction; others, such as the fifth, eighth and ninth, running to the merits, the ninth being general and in this language: "The court erred in divers other matters manifest upon the face of the record of said action." The petition for a writ of error alleged that the plaintiffs, "being aggrieved by the judgment made and entered in the above entitled cause on the 12th day of January, 1903, and the several rulings of the court herein, file herewith their assignment of errors in said cause and pray a writ of error to the end that the rulings and judgment of said court in said cause may be reversed by the Supreme Court of the United States." This petition was allowed generally and without any limitation or specification. The necessity of a certificate was affirmed in *Maynard* v. *Hecht*, (151 U. S. 324,) and what may be consid-

ered a sufficient certificate or taken as equivalent thereto considered in *In re Lehigh Mining & Manufacturing Company*, (156 U. S. 322;) *Shields* v. *Coleman*, (157 U. S. 168;) *The Bayonne*, (159 U. S. 687;) *Interior Construction Company* v. *Gibney*, (160 U. S. 217;) *Van Wagenen* v. *Sewall*, (Id. 369;) *Chappell* v. *United States*, (Id. 499;) *Smith* v. *McKay*, (161 U. S. 355.) The case of *Chappell* v. *United States*, *supra*, is closely in point. In that case Mr. Justice Gray, speaking for the court, after referring to tests laid down in prior cases, observed (p. 508:)

"The record in the present case falls for short of satisfying any such test. The defendant, among many other defences, and in various forms, objected to the jurisdiction of the District Court, because the act of Congress under which the proceedings were instituted was unconstitutional, because the proceedings were not according to the laws of the United States, and because they should have been had in a court of the State of Maryland; and the court, overruling or disregarding all the objections, whether to its jurisdiction over the case, or to the merits or the form of the proceedings, entered final judgment for the petitioners. There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the 'rulings, judgments and orders' of the court 'upon the question of jurisdiction raised in said exceptions, pleas and demurrers, and the other papers on file in this cause,' without defining or indicating any specific question of jurisdiction. Here, certainly, is no such clear, full and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute."

There being no sufficient certificate of jurisdiction, counsel for plaintiffs in error rely upon the proposition that there is involved in the case the application of the Constitution of the United States, and also the meaning and force of the treaty of October 21, 1803, between the United States and the Republic of France, and that, therefore, the case was rightfully brought directly to this court.

"But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question." *Chappell* v. *United States*, *supra*, 509; See also *Giles* v. *Harris*, 189 U. S. 475, 486.

The title upon which the plaintiffs rest was a grant made on February 22, 1788, by the governor general, in the name of the King of Spain, then the sovereign of the territory, and, as contended, protected by the treaty of 1803, which provided that the inhabitants of the province ceded should, among other things, "be maintained and protected in the free enjoyment of their . . . property." It was alleged that such provision, by a just construction of the treaty, extended to the property of the original grantee and descended from him to his heirs, but that the United States, denying

that plaintiffs were entitled to be maintained and protected in the enjoyment of their said property by any construction of the treaty, asserted title to the land, expelled the plaintiffs from possession and delivered it over to the defendant in this action, and that said defendant is in possession by direction of the United States, in pursuance of the unlawful and unjust possession so given him, and without any other right or claim of right than as an officer of the United States. Plaintiffs also averred that they were lawfully possessed of the land by inheritance from their ancestor, and that the United States, without process of law and without legal right so to do, took the same for public use without any compensation, and established defendant in possession thereof wrongfully and unjustly. By virtue of these allegations they contend that there is involved in this case the construction of a treaty, as well as the application of the Constitution of the United States, which forbids the taking of private property for public use without just compensation.

But it is well settled that in ejectment the plaintiffs must rest on their own title. If that title falls it is immaterial what wrong the defendant may have committed. There is nothing in the statutes of Arkansas which changes this rule. The averments of an infraction by the United States of its obligations under the treaty or an unlawful act in taking possession without compensation in defiance of the Constitution do not add to the plaintiffs' title. So far as the cause of action is concerned these averments are superfluous. Any action by the government is matter of defence and may never be presented by the defendant. He has a right to go to trial on the sufficiency of the title presented by the plaintiffs, and need neither plead nor prove the rightfulness of his possession by whomsoever it may have been given to him until they have shown that they have a title to the premises.

"The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought." (*Osborn* v. *Bank*, 9 Wheat. 738, 824.)

"By the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." (*Tennesseee* v. *Union & Planters' Bank et al.*, 152 U. S. 454, 464.)

See also *Chappel* v. *Waterworth*, (155 U. S. 102;) *Walker* v. *Collins*, (167 U. S. 57;) *Sawyer* v. *Kochersperger*, (170 U. S. 303,) in which this court said:

"The case was removed into the Circuit Court of the United States, but improvidently, as it falls within the rule laid down in *Tennessee* v. *Banks*, (152 U. S. 454,) notwithstanding the petition stated that defendants de-

clined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States." (*Florida Central &c. Railroad* v. *Bell*, 176 U. S. 321, 329; *Arkansas* v. *Kansas & Texas Coal Company*, 183 U. S. 185.)

We have not considered whether the averments distinctively made of the plaintiffs' title were sufficient to vest jurisdiction in the Circuit Court, for that question was settled against the plaintiff by the decision in *Filhiol* v. *Maurice, supra.*

As the plaintiffs' statement of their right to the possession of this land disclosed no case within the jurisdiction of the Circuit Court, that jurisdiction was not established by allegations as to the defence which the defendant might make or the circumstances under which he took possession.

The judgment of the Circuit Court is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.